(26,927)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 288.

C. B. MUNDAY, TRUSTEE; LA SALLE STREET TRUST AND SAVINGS BANK, AND WILLIAM C. NIBLACK, AS RECEIVER OF SAID LA SALLE STREET TRUST AND SAVINGS BANK, PLAINTIFFS IN ERROR,

vs.

WISCONSIN TRUST COMPANY AND FREDERICK ROBINSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

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1a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, being the highest court of law or equity in which a decision could be had in the said consolidated action of Wisconsin Trust Company and Frederick Robinson, plaintiffs, vs. C. B. Munday, Trustee, La Salle Street Trust & Savings Bank, a foreign corporation, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, defendants, and C. B. Munday, Trustee, La Salle Street Trust & Savings Bank, a banking corporation of the State of Illinois, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, plaintiffs, vs. Horace E. Walter, Wisconsin Trust Company, a corporation, Frederick Robinson and Lillian B. Robinson, his wife, David G. Janes, Receiver, Realty Realization Company, a corporation organized and existing under the laws of the State of Maine, and F. M. McKey, Trustee in Bankruptcy of said Realty Realization Company, a bankrupt, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State on the ground of their
2a being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein any title, right, privilege or immunity was claimed under the constitution, or any treaty or statute of or commission held, or authority exercised under the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such constitution, treaty, statute, commission or authority, a manifest error hath happened, to the great damage of the said C. B. Munday, Trustee, La Salle Street Trust & Savings Bank, a corporation, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date thereof; that the record and proceedings aforesaid being inspected, the said Supreme Court may

cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixth (6th) day of January, in the year of our Lord one thousand nine hundred and nineteen.

[Seal U. S. District Court, Western Dist. of Wisconsin, Madison.]

F. W. OAKLEY,
Clerk of the District Court of the United States,
for the Western District of Wisconsin,
By FRED W. FRENCH, *Deputy.*

Allowed by

[Seal Supreme Court of Wisconsin.]

JOHN B. WINSLOW,
Chief Justice of the Supreme Court
of the State of Wisconsin.

STATE OF WISCONSIN,
Supreme Court, ss:

The return to the within writ appears by the schedule hereto annexed.

The return of the Justices of the Supreme Court of the State of Wisconsin.

ARTHUR A. McLEOD,
Clerk of the Supreme Court of Wisconsin.

3*a* [Endorsed:] Filed Jan. 6, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis.

4a STATE OF WISCONSIN:

In the Supreme Court.

Number 1.

WISCONSIN TRUST COMPANY and FREDERICK ROBINSON, Plaintiffs and Respondents,

vs.

C. B. MUNDAY, Trustee; LA SALLE STREET TRUST & SAVINGS BANK, a Foreign Corporation, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, Defendants and Appellants.

Number 2.

C. B. MUNDAY, Trustee; LA SALLE STREET TRUST & SAVINGS BANK, a Banking Corporation of the State of Illinois, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank. Plaintiffs and Appellants,

vs.

HORACE E. WALTER, WISCONSIN TRUST COMPANY, a Corporation; Frederick Robinson and Lillian B. Robinson, His Wife; David G. Janes, Receiver; Realty Realization Company, a Corporation Organized and Existing under the Laws of the State of Maine, and F. M. McKey, Trustee in Bankruptcy of Said Realty Realization Company, a Bankrupt, Defendants and Respondents.

Consolidated Action.

Appeal from Circuit Court for Racine County.

5a *Petition for Writ of Error.*

To the Honorable John B. Winslow, Chief Justice of the State of Wisconsin:

And now come C. B. Munday, Trustee, La Salle Street Trust and Savings Bank, a corporation, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, the appellants in the above entitled cause, by Thomas M. Kearney, Hamilton Moses and Walter Bachrach, their attorneys, and represent that on the 19th day of June, 1918, a judgment was duly entered by the Supreme Court of Wisconsin affirming as modified a judgment entered by the Circuit Court for Racine County, Wisconsin, in the consolidated action of Wisconsin Trust Company and Frederick Robinson, plaintiffs, vs. C. B. Munday, Trustee, La Salle Street Trust & Savings Bank, a corporation, and William C. Niblack as Receiver of said La Salle Street

Trust & Savings Bank, defendants, and C. B. Munday, Trustee, La Salle Street Trust & Savings Bank, a banking corporation of the State of Illinois, and William C. Niblack as Receiver of said La Salle Street Trust & Savings Bank, plaintiffs, vs. Horace E. Walter, Wisconsin Trust Company, a corporation, Frederick Robinson and Lillian B. Robinson, his wife, David G. Janes, Receiver, Realty Realization Company, a corporation organized and existing under the laws of the State of Maine, and F. M. McKey, Trustee in Bankruptcy of said Realty Realization Company, a bankrupt, and awarding costs in favor of the respondents in said consolidated action; that on the 19th day of July, 1918, appellants herein filed in said Supreme Court of Wisconsin their petition for rehearing; that
6a said petition was duly entertained, and on the 8th day of October, 1918, said petition was denied by a majority of said court, Justices Vinje, Kerwin and Eschweiler dissenting, who filed their dissenting opinions, as will more fully appear from the proceedings on file in said cause.

And your petitioners further aver that in the Supreme Court of the State of Wisconsin appellants expressly contended that section 1770*b*, and more particularly sub-section 10 thereof, of the Wisconsin Statutes of 1911, as construed by the lower court, impaired the obligations of contracts within the meaning of clause first, of section 10, of Article I, of the constitution of the United States, and that as so construed the petitioners (appellants) were deprived of their property without due process of law, in violation of the XIVth amendment of the constitution of the United States guaranteeing that no person shall be deprived of his property without due process of law. It was also contended that said statute as construed by the Circuit Court for Racine County, Wisconsin, was and is unequal in its operation, and that it is therefore obnoxious to the provisions of the XIVth amendment of the constitution of the United States guaranteeing to each person within the state the equal protection of the laws. Various other federal questions were raised in the Supreme Court of Wisconsin and in the Circuit Court for Racine County, Wisconsin, namely, the failure of the said Circuit Court to give effect to certain previous decisions of said Supreme Court of Wisconsin, under which rights became vested in petitioners, and in ignoring the curative statute, viz., 1770*j* of the Wisconsin statutes as amended May 11, 1917, and also that the contract and deeds in question here which were held void by the Supreme Court of Wisconsin, were made outside of the State of Wisconsin, and that the State of Wisconsin had no power to penalize plaintiffs in error in respect thereof, and
7a that the ruling of the said Circuit Court in that respect was violative of the XIVth amendment of the constitution of the United States, and amounted to the taking of petitioners' property without due process of law and in violation of said amendment.

The Supreme Court of Wisconsin, in affirming as modified the decision of the said Circuit Court, in effect overruled all the contentions of the petitioners (appellants) and passed adversely upon all the federal claims of the petitioners (appellants) herein, and also

held that said section 1770*b*, and more particularly sub-section 10 thereof, of the Wisconsin statutes of 1911, did not and do not contravene the XIVth amendment of the constitution of the United States.

In the aforesaid judgment and proceedings certain errors were committed to the prejudice of your petitioners (appellants), all of which will more fully appear in the assignment of errors filed herewith, which errors the petitioners desire to have corrected by the Supreme Court of the United States on a writ of error.

Wherefore, your petitioners pray that a writ of error from the Supreme Court of the United States may issue in this cause to the Supreme Court of the State of Wisconsin, for the correction of errors so complained of, and that a transcript of record, proceedings and papers in this case, duly authenticated by the Clerk of the Supreme Court of Wisconsiin, may be sent and transmitted to the Supreme Court of the United States as provided by law.

Assignment of errors filed herewith.

THOMAS M. KEARNEY,
HAMILTON MOSES,
WALTER BACHRACH,
Attorneys for Petitioners (Appellants).

8*a* [Endorsed:] Filed Jan. 6, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis.

9a STATE OF WISCONSIN:

In the Supreme Court.

Number 1.

WISCONSIN TRUST COMPANY and FREDERICK ROBINSON, Plaintiffs and Respondents,

vs.

C. B. MUNDAY, Trustee; LA SALLE STREET TRUST & SAVINGS BANK, a Foreign Corporation, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, Defendants and Appellants.

Number 2.

C. B. MUNDAY, Trustee; LA SALLE STREET TRUST & SAVINGS BANK, a Banking Corporation of the State of Illinois, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, Plaintiffs and Appellants,

vs.

HORACE E. WALTER, WISCONSIN TRUST COMPANY, a Corporation; Frederick Robinson and Lillian B. Robinson, His Wife; David G. Janes, Receiver; Realty Realization Company, a Corporation Organized and Existing under the Laws of the State of Maine, and F. M. McKey, Trustee in Bankruptcy of said Realty Realization Company, a Bankrupt, Defendants and Respondents.

Consolidated Action.

Appeal from Circuit Court for Racine County.

Order Allowing Writ of Error.

10a On reading the petition of C. B. Munday, Trustee, La Salle Street Trust & Savings Bank, a corporation, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, appellants, for writ of error and the assignment of errors, and upon due consideration of the record of said cause;

It is ordered that a writ of error be allowed from the Supreme Court of the United States to the Supreme Court of the State of Wisconsin, as prayed for in said petition, and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States, in accordance with law, upon condition that the said petitioner and plaintiffs in error, C. B. Munday, Trustee, La Salle Street Trust & Savings Bank, a corporation, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, give security in the sum of One Thousand Dollars ($1,000.00), that the said plaintiffs in error shall prosecute said writ of error to effect,

and if said plaintiffs in error fail to make their plea good, shall answer to the defendants in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

And said plaintiffs in error, now presenting a bond in the sum of One Thousand Dollars ($1,000.00) with Massachusetts Bonding & Insurance Company, a corporation, as surety, it is ordered that the same be, and hereby is, duly approved.

In witness whereof, I have hereunto set my hand and seal this sixth (6th) day of January, A. D. 1919.

[Seal Supreme Court of Wisconsin.]

JOHN B. WINSLOW,
Chief Justice of the Supreme Court of the State of Wisconsin.

11*a* [Endorsed:] Filed Jan. 6, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis.

12*a* UNITED STATES OF AMERICA, *ss:*

To Wisconsin Trust Company, a Corporation, and Frederick Robinson, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington, D. C., within thirty (30) days from the service of this citation, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Wisconsin, wherein C. B. Munday, Trustee, La Salle Street Trust & Savings Bank, a corporation, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the hand and seal of the Honorable John B. Winslow, the Chief Justice of the Supreme Court of the State of Wisconsin, this sixth (6th) day of January, in the year of our Lord one thousand nine hundred and nineteen.

JOHN B. WINSLOW, [SEAL.]
Chief Justice of the Supreme Court of the State of Wisconsin.

Attest:

[Seal Supreme Court of Wisconsin.]

ARTHUR A. McLEOD,
Clerk of the Supreme Court of the State of Wisconsin.

13*a* Racine, Wisconsin,

January 8th, A. D. 1919.

We, attorneys of record for the defendants in error in the above entitled consolidated action, hereby acknowledge due service of the above citation, and enter our appearance in the Supreme Court of the United States.

JOHN B. SIMMONS,
M. E. WALKER,
W. E. BLACK,
Attorneys for Wisconsin Trust Company and Frederick Robinson.

14*a* [Endorsed:] C. B. Munday et al., plaintiffs in error, vs. Wisconsin Trust Company et al., defendants in error. Citation. Filed Jan. 9, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis.

15*a* In the Supreme Court of the United States.

Number 1.

WISCONSIN TRUST COMPANY and FREDERICK ROBINSON, Plaintiffs and Defendants in Error,

vs.

C. B. MUNDAY, Trustee; LA SALLE STREET TRUST & SAVINGS BANK, a Foreign Corporation, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, Defendants and Plaintiffs in Error.

Number 2.

C. B. MUNDAY, Trustee; LA SALLE STREET TRUST & SAVINGS BANK, a Banking Corporation of the State of Illinois, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, Plaintiffs and Plaintiffs in Error,

vs.

HORACE E. WALTER, WISCONSIN TRUST COMPANY, a Corporation; Frederick Robinson and Lillian B. Robinson, His Wife; David G. Janes, Receiver; Realty Realization Company, a Corporation Organized and Existing under the Laws of the State of Maine, and F. M. McKey, Trustee in Bankruptcy of said Realty Realization Company, a Bankrupt, Defendants and Defendants in Error.

Consolidated Action.

16*a* *Assignment of Errors.*

And now come C. B. Munday, Trustee, La Salle Street Trust & Savings Bank, a corporation, and William C. Niblack, as Receiver

of said La Salle Street Trust & Savings Bank, petitioners and plaintiffs in error, by Thomas M. Kearney, Hamilton Moses and Walter Bachrach, their attorneys, and in connection with their petition for a writ of error show that in the record and proceedings and in the rendering of the judgment and decision of the Supreme Court of Wisconsin in the above entitled causes, manifest error has intervened, to the injury and prejudice of the petitioners and plaintiffs in error in this, towit:

First. Section 1770*b*, and more particularly subsection 10 thereof, of the Wisconsin Statutes of 1911, as administered against plaintiffs in error and justified by the judgment of the Supreme Court of Wisconsin, are unconstitutional and void and contravene the XIVth amendment of the constitution of the United States providing, "nor shall any state deprive any person of life, liberty or property without due process of law," and by said judgment the petitioners and plaintiffs in error were deprived of certain lands and other property described in a certain contract and certain deeds in controversy in this case, which contract and deeds the Supreme Court of Wisconsin held to be void.

Second. Section 1770*b*, and more particularly subsection 10 thereof, of the Wisconsin Statutes of 1911, as administered and enforced against plaintiffs in error by the judgment of the Supreme Court of Wisconsin, is unconstitutional and void in this, that it impairs the vested rights of the plaintiffs in error secured under said section, as previously construed by the said Supreme Court of
17*a* Wisconsin, which construction had become and was a rule of property and a part of the contract and deeds in controversy, and thus violates clause first of Section 10, of Article I, of the constitution of the United States, providing that "no state shall pass any law impairing the obligation of contracts," and by so administering said section plaintiffs in error were by the judgment of said Supreme Court of Wisconsin deprived of their property without due process of law, in violation of the XIVth amendment of the constitution of the United States, providing "nor shall any state deprive any person of life, liberty or property without due process of law."

Third. Section 1770*b*, and more particularly subsection 10 thereof, of the Wisconsin Statutes of 1911, as administered and enforced against plaintiffs in error by the judgment of the Supreme Court of Wisconsin, is unconstitutional and void in this, that it impairs the vested rights of the plaintiffs in error secured under said section as previously construed by said Supreme Court of Wisconsin, which construction had become and was a rule of property and a part of the contract and deeds in controversy, and thus violates clause first, of Section 10, of Article I, of the constitution of the United States, providing that "not state shall pass any law impairing the obligation of contracts."

Fourth. Section 1770*b*, and more particularly subsection 10 thereof, of the Wisconsin Statutes of 1911, as administered and enforced against plaintiffs in error by the Supreme Court of the State of Wisconsin, is unconstitutional and void, in that it violates the XIVth amendment of the constitution of the United States, pro-

viding "nor shall any state deprive any person of life, liberty or property without due process of law.

18a Fifth. By the judgment of the Supreme Court of Wisconsin the plaintiffs in error were deprived of their property without due process of law, in violation of the XIVth amendment of the constitution of the United States providing, "nor shall any state deprive any person of life, liberty or property without due process of law," in this that said Supreme Court of Wisconsin in administering section 1770*b*, and more particularly sub-section 10 thereof, of the Wisconsin Statutes of 1911, refused to give any effect whatever to section 1770*j* of the Wisconsin statutes, as amended May 11, 1917, by Chapter 211 of the Wisconsin Laws of 1917, which became part of the contract and deeds in controversy in this case, and a rule of property, and that as so administered and enforced against plaintiffs in error, said section 1770*b*, and more particularly sub-section 10 thereof of the Wisconsin Statutes of 1911, is unconstitutional and void, and violates clause first, of section 10, of Article I, of the constitution of the United States, providing that "no state shall pass any law impairing the obligation of contracts."

Sixth. Section 1770*b*, and more particularly subsection 10 thereof, of the Wisconsin Statutes of 1911, as administered and justified by the Supreme Court of the State of Wisconsin, is unconstitutional and void and violates the provisions of the XIVth amendment of the constitution of the United States, providing "nor shall any state deprive any person of life, liberty or property without due process of law," in this, that it deprives a person or corporation of the right to contract freely outside of the State of Wisconsin, and imposes a penalty for so doing; that by so construing, enforcing and ad-

19a ministering said section, and more particularly sub-section 10 thereof, against plaintiffs in error, the Supreme Court of Wisconsin by its judgment deprived plaintiffs in error of their property without due process of law, in violation of the aforesaid provision of the XIVth amendment of the constitution of the United States.

Seventh. Section 1770*b*, and more particularly sub-section 10 thereof, of the Wisconsin Statutes of 1911, is unconstitutional and void and violates the XIVth amendment of the constitution of the United States, providing that "no state shall deny to any person within its jurisdiction the equal protection of the laws," because said section is unequal in its operation in this, that it denies to non-complying foreign corporations the rights, titles and benefits accruing under contracts coming within the terms of said section, and grants to other persons who are parties to such contracts such rights, titles and benefits, and thereby denies to such non-complying foreign corporations the equal protection of the laws guaranteed by the aforesaid XIVth amendment of the constitution of the United States. The Supreme Court of Wisconsin in enforcing said discriminatory section of the Wisconsin statutes against the plaintiffs in error thereby deprived them of their property without due process of law, in violation of the said XIVth amendment of the constitution of the United States.

Eighth. Section 1770*b*, and more particularly sub-section 10

thereof, of the Wisconsin Statutes of 1911, as administered, construed and enforced against plaintiffs in error in this case, is unconstitutional and void, in this, that the said section is unequal in its operation, because it makes it optional with the party dealing
20*a* with a foreign corporation which has not complied with its terms, to enforce or repudiate the contract made with such foreign corporation, while the same right and privilege is denied to the foreign corporation, all of which is in contravention of the XIVth amendment of the constitution of the United States, providing that "no state shall deny to any person within its jurisdiction the equal protection of the laws," and thereby plaintiffs in error were by the judgment of the Supreme Court of Wisconsin deprived of their property without process of law, in violation of said XIVth amendment of the constitution of the United States, providing "nor shall any state deprive any person of life, liberty or property without due process of law."

Ninth. The Supreme Court of Wisconsin erred in affirming, as modified, the judgment of the Circuit Court for Racine County, Wisconsin, and in entering judgment against plaintiffs in error.

By reason whereof these petitioners and plaintiffs in error pray that the said judgment of the Supreme Court of Wisconsin may be reversed, etc.

Dated, the 6th day of January, A. D. 1919.

THOMAS M. KEARNEY,
HAMILTON MOSES,
WALTER BACHRACH.

21*a* [Endorsed:] Filed Jan. 6, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis.

22*a* SUPREME COURT OF THE STATE OF WISCONSIN, *ss:*

I, Arthur A. McLeod, Clerk of said Supreme Court of the State of Wisconsin, do hereby certify that there was lodged with me as such Clerk, on January 6, 1919, in the consolidated action of Wisconsin Trust Company and Frederick Robinson, Plaintiffs and Respondents, vs. C. B. Munday, Trustee, La Salle Street Trust & Savings Bank, a foreign corporation, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, Defendants and Appellants, and C. B. Munday, Trustee, La Salle Street Trust & Savings Bank, a banking corporation of the State of Illinois, and William C. Niblack as Receiver of said La Salle Street Trust & Savings Bank, Plaintiffs and Appellants, vs. Horace E. Walter, Wisconsin Trust Company, a corporation, Frederick Robinson and Lillian B. Robinson, his wife, David G. Janes, Receiver, Realty Realization Company, a corporation organized and existing under the laws of the State of Maine, and F. M. McKey, Trustee in Bankruptcy of said Realty Realization Company, a bankrupt, Defendants and Respondents,—

1. The original bond, approved by the Chief Justice of said court

on the 6th day of January, 1919, given as security for the prosecution of the writ of error in the United States Supreme Court,

2. The original writ of error issued by the Honorable John B. Winslow, Chief Justice of said court on the 6th day of January, 1919, together with three copies, one for each defendant in error, and one for the files of my office.

23*a* In witness whereof I have hereunto set my hand and affixed the seal of said court, at my office in Madison, Wisconsin, this sixth (6th) day of January, A. D. 1919.

[Seal Supreme Court of Wisconsin.]

ARTHUR A. McLEOD,
Clerk of the Supreme Court of Wisconsin.

24*a* [Endorsed:] Filed Jan. 6, 1919. Arthur A. McLeod, Clerk of Supreme Court, Wis.

25*a* Copy.

Know all men by these presents, that C. B. Munday, Trustee, La Salle Street Trust & Savings Bank, a corporation, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, as principals, and Massachusetts Bonding and Insurance Company, a Massachusetts corporation, as surety, are held and firmly bound unto Wisconsin Trust Company, a corporation, and Frederick Robinson, in the sum of One Thousand Dollars ($1,000), to be paid to the said Wisconsin Trust Company and Frederick Robinson, for which payment well and truly to be made we bind ourselves jointly and severally by these presents.

Sealed with our seals and dated this 6th day of January, A. D. 1919.

Whereas, the above named C. B. Munday, Trustee, La Salle Street Trust & Savings Bank, a corporation, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, plaintiffs in error, have sued out a writ of error from the United States Supreme Court to the Supreme Court of Wisconsin to reverse the judgment of the Supreme Court of Wisconsin, rendered on the 29th day of June, 1918, in the consolidated action of Wisconsin Trust Company and Frederick Robinson, plaintiffs, vs. C. B. Munday, Trustee, La Salle Street Trust & Savings Bank, a corporation, and William C. Niblack as Receiver of said La Salle Street Trust & Savings Bank, defendants, and C. B. Munday, Trustee, La Salle Street Trust & Savings Bank, a banking corporation of the State of Illinois, and William C. Niblack as Receiver of said La Salle Street Trust & Savings Bank, plaintiffs, vs. Horace E. Walter, Wisconsin Trust Company, a corporation, Frederick Robinson and Lillian B. Robinson, his wife, David G. Janes, Receiver, Realty Realization Company, a corporation organized and existing under the laws of the State of Maine, and

F. M. McKey, Trustee in Bankruptcy of said Realty Realization Company, a bankrupt, defendants:

Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error, C. B. Munday, Trustee, La Salle Street Trust & Savings Bank, a corporation, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, shall prosecute their said writ of error to effect and answer all costs and damages that may be adjudged, if they shall fail to make good their plea, then this obligation is to be void; otherwise to remain in full force and effect.

C. B. MUNDAY, *Trustee,* [SEAL.]
LA SALLE STREET TRUST & SAVINGS BANK,
By C. B. MUNDAY, *Vice President,* [SEAL.]
WILLIAM C. NIBLACK, [CORP. SEAL.]
As Receiver of La Salle Street Trust & Savings Bank.
MASSACHUSETTS BONDING AND INSURANCE CO. [SEAL.]
R. C. KROPF, *Attys. in Fact.*

Approved this 6th day of January, A. D. 1919.
JOHN B. WINSLOW,
Chief Justice of the Supreme Court of the State of Wisconsin.

26*a*–108*a* Filed Jan. 6, 1919. Arthur A. McLeod, Clerk of Su-Supreme Court, Wis.

* * * * * * *

109 STATE OF WISCONSIN:

Circuit Court, Racine County.

WISCONSIN TRUST COMPANY and FREDERICK ROBINSON, Plaintiffs,

vs.

HORACE E. WALTER and DAVID G. JANES COMPANY, a Corporation, Defendants.

WISCONSIN TRUST COMPANY and FREDERICK ROBINSON, Plaintiffs,

vs.

REALTY REALIZATION COMPANY, a Foreign Corporation; HORACE E. WALTER, C. B. MUNDAY, Trustee, and The La Salle Street Trust and Savings Bank, a Foreign Corporation, Defendants.

C. B. MUNDAY, Trustee, and THE LA SALLE STREET TRUST AND SAVINGS BANK, a Banking Corporation of the State of Illinois, Plaintiffs,

vs.

HORACE E. WALTER, WISCONSIN TRUST COMPANY, a Corporation; Frederick Robinson and Lillian B. Robinson, His Wife; David G. Janes, Receiver; Realty Realization Company, a Corporation Organized and Existing under the Laws of the State of Maine, and F. M. McKey, Trustee in Bankruptcy of said Realty Realization Company, a Bankrupt, Defendants.

It is hereby stipulated by and between the various parties to the above entitled actions, all of which are now pending in the Circuit Court for Racine County, in the State of Wisconsin, that, in the above entitled action wherein Wisconsin Trust Company and Frederick Robinson are plaintiffs and Realty Realization
110–117½ Company, a foreign corporation, Horace E. Walter, C. B. Munday, Trustee, and the La Salle Street Trust and Savings Bank, a foreign corporation, are defendants, F. M. McKey, trustee in bankruptcy of said Realty Realization Company, a corporation, bankrupt, may be added as a party defendant; and that the summons in said action and the complaint therein and all pleadings, stipulations and other papers and proceedings in said action may be amended without notice and without costs by adding said F. M. McKey, trustee in bankruptcy of said Realty Realization Company, a corporation, bankrupt, as a defendant in said action.

It is further stipulated that an order of said Court may be entered on said stipulation forthwith amending the summons and complaint and all the pleadings, stipulations, papers and proceedings in said action by adding as a defendant in said action F. M. McKey, trustee

in bankruptcy of Realty Realization Company, a corporation, bankrupt.

Dated January 18th, A. D. 1917.

SIMMONS & WALKER,
Attorneys for Wisconsin Trust Company and Frederick Robinson, David G. Janes Company, and David G. Janes, Receiver.

HAND & QUINN,
Attorneys for Realty Realization Company, Horace E. Walter, and F. M. McKey, Trustee in Bankruptcy of Realty Realization Company, a Bankrupt.

KEARNEY, THOMPSON & MEYERS,
Attorneys for C. B. Munday and La Salle Street Trust and Savings Bank, and Wm. C. Niblack, Receiver of said Bank.

* * * * * * *

118 STATE OF WISCONSIN:

In Circuit Court for Racine County.

Number 1.

WISCONSIN TRUST COMPANY and FREDERICK ROBINSON, Plaintiffs,

vs.

REALTY REALIZATION COMPANY, a Foreign Corporation; F. M. MCKEY, as Trustee in Bankruptcy of said Realty Realization Company; Horace E. Walter, C. B. Munday, Trustee; La Salle Street Trust & Savings Bank, a Foreign Corporation, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, Defendants.

Number 2.

C. B. MUNDAY, Trustee; LA SALLE STREET TRUST & SAVINGS BANK, a Banking Corporation of the State of Illinois, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, Plaintiffs,

vs.

HORACE E. WALTER, WISCONSIN TRUST COMPANY, a Corporation; Frederick Robinson and Lillian B. Robinson, His Wife; David G. Janes, Receiver; Realty Realization Company, a Corporation Organized and Existing under the Laws of the State of Maine, and F. M. McKey, Trustee in Bankruptcy of said Realty Realization Company, a Bankrupt, Defendants.

Consolidated Action.

The above entitled actions being at issue and counsel for the respective parties having stipulated in writing that the same be con-

solidated and tried together as one action, and the said consolidated action having come on for trial before the said Circuit Court at the April, 1915 term thereof, to-wit, commencing on the 4th day of October, 1915; and the Court having heard the evidence offered
119 therein and the arguments of counsel, and the taking of testimony and the said arguments of counsel having been concluded on or about the 19th day of January, 1917; and the court having thereupon taken the case under advisement, with leave of counsel to submit written briefs, and such briefs having been submitted and considered by the court; the court being now sufficiently advised in the premises, finds the facts to be as follows:

Findings of Fact.

First. That the Wisconsin Trust Company is and at all the times mentioned in the pleadings was a corporation organized and existing under the laws of the State of Wisconsin, having its principal office and place of business at the City of Milwaukee in said State.

Second. That the La Salle Street Trust & Savings Bank is, and at all said times was, a banking corporation duly organized and existing under the laws of the State of Illinois, and engaged in the business of banking at the City of Chicago, in Cook County, in said State of Illinois; that subsequent to the commencement of this action and before the trial thereof, said La Salle Street Trust & Savings Bank became insolvent, and William C. Niblack was, pursuant to the laws of said State of Illinois, duly appointed Receiver thereof, and duly qualified as such Receiver, and thereupon applied to be admitted as a party defendant in this action, and was so admitted, and that at the time of the trial of this action he was, and now is, the duly appointed, qualified and acting Receiver of said Bank.

Third. That the defendant, Realty Realization Company
120 is, and at all said times was, a corporation organized and existing under the laws of the State of Maine, whose principal business was dealing in real estate, and whose principal business office was located at the City of Chicago, in the State of Illinois; and that at the time of the transactions referred to in the pleadings, and down to the time of the commencement of the above entitled action, said corporation had not complied with the laws of the State of Illinois, or with the laws of the State of Wisconsin, relating to foreign corporations, and had not been licensed under the laws of either of said states of Illinois or Wisconsin, to transact business or acquire, hold or transfer property therein.

Fourth. That the Wisconsin Trust Company was on and prior to the 27th day of February, 1913 the holder, as trustee, of the legal title, and Frederick Robinson was, at said time, the owner of the entire equitable title to the real estate in controversy herein situate in the City and County of Racine, in the State of Wisconsin; and that the trust upon which the said Wisconsin Trust Company held said legal title was of such a nature that the said Frederick Robinson had the absolute right to control the sale, and direct as to the conveyance thereof.

Fifth. That on or about the 28th day of February, 1913, an instrument in the form of a contract for the sale of said property in controversy by said Frederick Robinson to the said Realty Realization Company, substantially in the form of the copy "Exhibit A" attached to the separate answers of the defendant, Realty Realization Company, and the defendant, Horace E. Walter in said first entitled action, was executed by the parties named therein, the same
121 having been signed by the said Frederick Robinson at the City of Racine, in the State of Wisconsin, and mailed by him to his agent, M. Paul Noyes, in the City of Chicago, in the State of Illinois where it was, on the said 28th day of February, 1913, executed on the part of said corporation, by the officers thereof, at the same time that the deeds referred to in the complaint herein were delivered.

Sixth. That deeds were also executed by the said Wisconsin Trust Company and by Frederick Robinson and wife bearing date the 27th day of February, 1913, and delivered on February 28, 1913, wherein the said Realty Realization Company was named as grantee, purporting to convey said real estate to said Realty Realization Company, its successors and assigns, in fee simple, which deeds were delivered by M. Paul Noyes, the agent of the said Frederick Robinson, to the said grantee, at the City of Chicago aforesaid.

Seventh. That the sale of said premises was made by the said Frederick Robinson, independently of and uninfluenced by the said Wisconsin Trust Company, and the conveyance thereof by said Wisconsin Trust Company was made by it at the request and by the express direction of the said Frederick Robinson.

Eighth. That in order to induce the execution by said Frederick Robinson of said contract of sale, and to procure the execution and delivery of said Wisconsin Trust Company and by Frederick Robinson and wife of the aforesaid deeds of said premises, the said Realty Realization Company, by its president Clinton S. Woolfolk, and other officers and agents of the corporation, falsely and fraudulently represented to the said Frederick Robinson, in substance and
122 effect, that said corporation was financially strong and solvent, was possessed of valuable properties consisting principally of extensive holdings of real estate in large tracts located in various states of the United States, but principally in Louisiana and Texas, in value exceeding many times its liabilities. That it was doing an extensive and profitable business, which business consisted chiefly in the acquisition of large tracts of unimproved acreage property, and subdividing and selling the same in smaller tracts at a large profit; that its purpose in seeking to acquire the property of said Frederick Robinson was to enable it to acquire additional acreage tracts for subdivision; the fact that it was improved and income bearing property rendering it especially available for that purpose, and that for such purpose it could be traded in at a price largely in excess of the price asked therefor by said Robinson; that said corporation had then a present plan and purpose to exchange said Racine property for a valuable tract adjoining their then holdings in the State of Texas; that in order to make use of said property for said

purpose, it was necessary to have the title unincumbered, for which reason alone said corporation could not give back a mortgage to said Frederick Robinson for the unpaid purchase price. That said statements and representations were believed and relied upon by the said Frederick Robinson in making said contract of sale, and in executing and procuring the execution of said deeds of conveyance, and the execution and delivery of said contract and said deeds was induced and procured by said representations. That said statements and representations were in fact false and fraudulent, in this that said Realty Realization Company was, at the time of the making of said
123 representations, deeply embarrassed and on the verge of bankruptcy; that it had no assets of substantial value and no expectation or intention of ever paying for said property; and that in the month of April, 1913, an involuntary petition in bankruptcy was filed against it in the District Court of the United States for the Northern District of Illinois, Eastern Division, upon which a receiver was appointed immediately and upon which said corporation was subsequently adjudged a bankrupt, and although four years have elapsed since the filing of said petition, no dividend has been paid to creditors, and the payment of any dividend appears extremely doubtful;—and that the defendant, F. M. McKey, is the duly appointed, qualified and acting trustee in bankruptcy of said bankrupt corporation.

Ninth. That the president of said corporation, the said Clinton S. Woolfolk, who agreed to and did endorse said notes of said corporation given for the unpaid purchase price of said premises, and who was also represented to the said Frederick Robinson to be a man of wealth and financial responsibility, was, on the contrary, utterly bankrupt and at the end of his resources and died from a gun-shot wound, within thirty days after the execution and delivery of said contract and deeds; that neither said corporation, Realty Realization Company, nor its said officers, had any present intention or purpose to use said Robinson property for exchange for acreage property as represented, but the sole object of said corporation and of the said Clinton S. Woolfolk, its president, in seeking to acquire an unincumbered title to said property, was to enable it to mortgage the same and thereby raise money, either for the personal use of the said Clinton S. Woolfolk, or to satisfy some of the more press-
124 ing creditors of said corporation, or both.

Tenth. That immediately upon procuring said deeds of conveyance and in order to facilitate said purpose of hypothecating said property and obtaining money thereon, said corporation, acting under the direction of the said Clinton S. Woolfolk, its president, conveyed the said Robinson property to said defendant, Horace E. Walter, who was a mere clerk in the employ of the company, wholly without means or financial responsibility, and who took the deed thereof, without the payment of any consideration, and solely for the use and convenience of said corporation, and who never has and does not now claim any personal or pecuniary interest therein.

Eleventh. That immediately upon the execution and delivery of said deeds of conveyance from the Wisconsin Trust Company and

from Frederick Robinson and wife to the said Realty Realization Company and before said deeds were recorded, the said Company by Clinton S. Woolfolk, its president aforesaid, began negotiations with the said La Salle Street Trust and Savings Bank of Chicago, Illinois, for a loan of money to be secured by mortgage or trust deed upon said property, and on the 5th day of March, 1913, procured a note for $50,000 to be executed by the said Horace E. Walter, secured by a trust deed upon said property, executed by the said Horace E. Walter to C. B. Munday, who was vice-president of said La Salle Street Trust & Savings Bank, as trustee, upon which, as collateral, the said La Salle Street Trust & Savings Bank made a loan of $40,000 in the manner hereinafter set forth.

125 Twelfth. That at the suggestion of said La Salle Street Trust & Savings Bank, the said Horace E. Walter executed another note for $40,000 payable to his own order and endorsed by him in blank, which note was delivered to said bank, with said original note of $50,000 and said trust deed, and certain fire insurance policies upon said property as collateral, and said Bank in consideration thereof, and on March 8, 1913 issued its four (4) time certificates of deposit dated March 8, 1913, payable to the order of Clinton S. Woolfolk, each for the sum of $10,150 payable without interest six months after said last mentioned date, said date of payment being subsequent to the maturity dates of both the said $40,000 note and said $50,000 note, which certificates of deposit were immediately discounted by said Clinton S. Woolfolk with one James H. Prentiss, the rate of discount on two of said certificates being seven per cent. (7%) per annum, and used part of the proceeds for the benefit of said Realty Realization Company, the balance being unaccounted for.

Thirteenth. That the $50,000 note and trust deed referred to in the preceding Finding No. Eleventh, and the $40,000 note of Horace E. Walter referred to in the proceding Finding No. Twelfth, are the same notes and trust deeds referred to in the complaint in the second above-entitled action upon which the plaintiffs therein seek judgment of foreclosure.

Fourteenth. That the deeds of said Racine property from the Wisconsin Trust Company and from Frederick Robinson and wife to said Realty Realization Company and from said Realty Realization Company to the said Horace E. Walter, all still unrecorded,

126 were delivered by the said Clinton S. Woolfolk to the La Salle Street Trust & Savings Bank along with said trust deed to C. B. Munday, Trustee, and were, by said bank, thereupon forwarded to Racine, Wisconsin, where they were received and filed for record, on the 11th day of March, 1913, in the office of the Register of Deeds in and for the County of Racine, and were recorded as in the pleadings herein set forth.

Fifteenth. That at the time of making said loan, and for some time prior thereto, the said Realty Realization Company and Clinton S. Woolfolk, the President thereof, were depositors in and customers of said La Salle Street Trust & Savings Bank, and were well known to the said bank, and the officers thereof, particularly the said C. B.

Munday; that before making said loan, the said bank made no examination of said property, did not submit the abstract of title thereto, or said title papers delivered to it as aforesaid, to its attorney or attorneys for examination, or have from such attorney or attorneys an opinion as to the validity of the said Horace E. Walter's title thereto; were unacquainted with and made no inquiry as to Horace E. Walter, his business or financial standing, and made no inquiry as to whether the said Realty Realization Company had complied with the foreign corporation laws of Wisconsin, or was authorized to transact business or acquire, hold or convey property within said state.

That said La Salle Street Trust & Savings Bank failed to exercise ordinary care and prudence in the premises; that at and prior to the time of making said loan, as aforesaid, it was warned and put upon inquiry by the very instruments offered to it as muni-
127 ments of title, that the property offered to it as security for the loan was located in Wisconsin, and appeared to have been acquired by or through the Realty Realization Company, a corporation of the State of Maine, and that said corporation had not complied with the foreign corporation laws of the State of Wisconsin to entitle it to do business and acquire property in said State, and that it did not, nor did Horace E. Walter, claiming through it, acquire any title to said property.

Sixteenth. That the consideration received by said Frederick Robinson for said property in controversy was Five Thousand Dollars ($5000.) in cash, together with the promissory notes of said Realty Realization Company endorsed by said Clinton S. Woolfolk for the sum of Seventy Thousand Dollars ($70,000.) secured by the issue and deposit as collateral of Preferred Capital Stock of said Realty Realization Company of the par value of Seventy Thousand Dollars, and a bonus of Five Thousand Dollars of the Common Capital Stock of said Realty Realization Company; that said Robinson property was of the actual value of approximately from Seventy Thousand Dollars to Seventy-five Thousand Dollars and that excepting said cash payment of five thousand dollars the consideration received therefor by the said Frederick Robinson was utterly worthless.

Seventeenth. That said Frederick Robinson has offered, in his complaint in the action first above-entitled and in his answer in the second action above-entitled, and upon the trial offered and tendered in court, to return to the Realty Realization Company, or its trustee, or to the La Salle Street Trust & Savings Bank, or its Receiver, or such other party or parties hereto as the court might find en-
128 titled thereto. the money so received by him with interest thereon, together with all said promissory notes and stocks.

Eighteenth. That neither the Wisconsin Trust Company nor the said Frederick Robinson had any knowledge of the negotiations with said La Salle Street Trust & Savings Bank for a loan upon said property in controversy, until after said loan was made and about the time of the death of the said Clinton S. Woolfolk, and said trust deed was given and said loan obtained entirely without their knowledge or consent.

Nineteenth. That the La Salle Street Trust & Savings Bank paid its said certificates of deposit at or prior to the maturity thereof to the holders, who discounted the same for the said Clinton S. Woolfolk, and no part thereof has ever been repaid to said Bank or to the Receiver thereof.

Twentieth. That at the time of making said contract above referred to, and at the time of executing and causing to be executed the said deeds of conveyance to the Realty Realization Company, neither the Wisconsin Trust Company nor the said Frederick Robinson had any notice or knowledge that said corporation had failed to comply with the foreign corporation laws of this state, or that it had no authority to transact business or acquire or hold property within this state; that within a few days after the death of the said Clinton S. Woolfolk, to-wit, on or about March 30, 1913, said Frederick Robinson first learned of such default on the part of said corporation, and its disqualification to take or hold property within this state; and that immediately thereupon, on the said 30th day of March, 1913, he caused an action of ejectment to be brought in the name of himself and the said Wisconsin Trust Company, to recover the possession of said premises, and also caused the action in equity, first above-entitled, to be brought in the names of himself and the said Wis-
129 consin Trust Company, as plaintiffs, against Horace E. Walter, Realty Realization Company, C. B. Munday, as Trustee, and the La Salle Street Trust & Savings Bank as defendants, to set aside and vacate the deeds of said property to the said Realty Realization Company and from said Realty Realization Company to Horace E. Walter, and the trust deed from said Horace E. Walter to C. B. Munday, Trustee, and remove the same as clouds upon his title, and to vacate and expunge the records thereof in the office of the Register of Deeds for said County of Racine, State of Wisconsin, and to quiet the title of the said Wisconsin Trust Company and the said Frederick Robinson to said premises as against said named defendants.

Twenty-first. That in said action of ejectment David G. Janes of Racine, Wisconsin was duly appointed by this court Receiver of the rents and profits of said premises, by an order dated August 16, 1913; and he has ever since been in charge of said premises as such Receiver; and has collected the rents and profits thereof, and now has the same in his possession, less the necessary current expenses paid by him, subject to the order and judgment of this court; and that prior to the appointment of said Receiver, the David G. Janes Company, a corporation, one of the defendants in said ejectment action, was in charge of said premises, subsequent to the conveyance thereof to said Realty Realization Company and prior to the appointment of said Receiver, as agent for said Realty Realization Company, and as such agent collected the rents or some part thereof accruing during said period, all of which have been paid over to said Receiver.

130 And as

Conclusions of Law

the Court finds:

First. That the said deeds of conveyance from the Wisconsin Trust Company and from Frederick Robinson and wife to the Realty Realization Company and the said contract of sale between the said Frederick Robinson and the said Realty Realization Company, were and are wholly null and void.

Second. That said Realty Realization Company, having no title to the property in controversy, conveyed none by its deed to the said Horace E. Walter, and the trust deed executed by the said Horace E. Walter to the defendant, C. B. Munday, Trustee, created no lien upon said premises, and was and is a nullity.

Third. That the La Salle Street Trust & Savings Bank and C. B. Munday, Trustee, were and are chargeable with notice and knowledge of the invalidity of the title claimed by and through the Realty Realization Company to the premises in controversy, and that the Wisconsin Trust Company and Frederick Robinson are not estopped by any act or conduct on their part, from asserting their title to the said premises, as against any of the other parties hereto.

Fourth. That the Receiver of said La Salle Street Trust & Savings Bank, by virtue of said trust deed and the loan made thereon by said bank, acquired no lien upon and no right to be subrogated to the rights of said Realty Realization Company in the consideration received by the said Frederick Robinson for said property and now offered to be restored by him, but the defendant, F. M. McKey, as Trustee in Bankruptcy of said Realty Realization Company,
131 is entitled to receive the said consideration, being the sum of Five Thousand Dollars ($5000) in money, with the interest thereon, and also the promissory notes of said Realty Realization Company, and the common and preferred capital stock of said corporation, received and heretofore held by the said Frederick Robinson.

Fifth. That the said Wisconsin Trust Company and Frederick Robinson are entitled to judgment for the relief prayed for in their amended complaint in the first action entitled above.

Sixth. That they are also entitled to judgment dismissing, on the merits, the counterclaims set up in the separate answers of the defendants, Realty Realization Company and Horace E. Walter in said last mentioned action.

Seventh. That Wisconsin Trust Company, Frederick Robinson and Lillian B. Robinson, defendants in Action No. Two above-entitled, are entitled to judgment for the relief prayed for in their separate answer therein, namely, for judgment dismissing the complaint in said action upon the merits, setting aside and vacating the trust deed mentioned and described in the complaint in said action and removing the same of record in the office of the Register of Deeds in and for Racine County, Wisconsin, as clouds upon their title, and quieting the title of said defendant in and to the real estate therein described.

Eighth. That the said Wisconsin Trust Company and Frederick Robinson are entitled to judgment for costs herein in action No. 1 against the defendant Horace E. Walter, personally, and also against Realty Realization Company and F. M. McKey, Trustee
132 thereof in Bankruptcy, to be collected from the estate of said Bankrupt, and in action No. 2 against C. B. Munday, Trustee, La Salle Street Trust & Savings Bank and William C. Niblack, as Receiver thereof, to be collected from the assets of said bank in the hands of said Receiver, disbursements to be prorated equally to each case.

Let judgment be entered accordingly.

Dated, Racine, Wisconsin, December 8th, A. D. 1917.

By the Court:

E. B. BELDEN, *Judge.*

132½ (Indorsements:) Circuit Court, Racine County. Wisconsin Trust Co. and Frederick Robinson, Plffs., vs. Realty Realization Co. et al., Defts. C. B. Munday, Trustee, et al., Plffs., vs. Horace E. Walter et al., Defts. Findings of Fact and Conclusions of Law. Original. Simmons & Walker, Robinson Building, Racine, Wisconsin, Attorneys for —— ——. Filed Dec. 8, 1917. John C. Hood, Clerk Circuit Court. Filed Dec. 27, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

133 At a General Term of the Circuit Court for Racine County, State of Wisconsin. Held at the Court-house, in the City of Racine, in said County, Commencing on the Third Monday of November, A. D. 1917, and on the 8th Day of December, A. D. 1917.

Present: Hon. E. B. Belden, Circuit Judge, Presiding.

STATE OF WISCONSIN:

Circuit Court, Racine County.

Number 1.

WISCONSIN TRUST COMPANY and FREDERICK ROBINSON, Plaintiffs,

vs.

REALTY REALIZATION COMPANY, a Foreign Corporation; F. M. McKEY, as Trustee in Bankruptcy of said Realty Realization Company; Horace E. Walter, C. B. Munday, Trustee: La Salle Street Trust and Savings Bank, a Foreign Corporation, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, Defendants.

Number 2.

C. B. MUNDAY, Trustee; La Salle Street Trust & Savings Bank, a Banking Corporation of the State of Illinois, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, Plaintiffs,

vs.

HORACE E. WALTER, WISCONSIN TRUST COMPANY, a Corporation; Frederick Robinson and Lillian B. Robinson, His Wife; David G. James, Receiver; Realty Realization Company, a Corporation Organized and Existing under the Laws of the State of Maine, and F. M. McKey, Trustee in Bankruptcy of said Realty Realization Company, a Bankrupt, Defendants.

Consolidated Action.

134 The above-entitled action having been by stipulation of counsel for the respective parties, therein, consolidated and tried as one, said trial being by the court without a jury, and the court having made and filed its Findings of Fact and Conclusions of Law therein, bearing date, Dec. 8, 1917, and having by its order of same date directed judgment, as herein below set forth; now on motion of Simmons & Walker, attorneys for the prevailing parties,

It is ordered and determined:

(1) That the deed of conveyance mentioned and described in the complaint in the above-entitled action Number 1, executed by Wisconsin Trust Company to the Realty Realization Company, a corporation of the State of Maine, bearing date Feb. 27, 1913, and recorded in the office of the Register of Deeds in and for Racine County, Wisconsin on March 11, 1913, in Vol. 142 of Deeds, on page 557;—also that certain other deed of conveyance mentioned and described in the complaint in said action Number 1, executed by Frederick Robinson and Lillian B. Robinson, his wife, to Realty Realization Company, a corporation of the State of Maine, bearing date Feb. 27,

1913, and recorded in the office of the Register of Deeds in and for Racine County aforesaid, on March 11, 1913, in Vol. 135 of Deeds on page 390; also a certain unrecorded contract for the sale of the premises described in said above-mentioned deeds of conveyance, which contract is referred to and described in the separate answers of the defendants, Horace E. Walter and Realty Realization Company, in said above-entitled action Number 1, and bears date on or about the 27th day of February, 1913, and was executed by and between Frederick Robinson, of the first part, Realty Realization
Company, a corporation of the State of Maine, of the second
135 part, and Clinton S. Woolfolk, of the third part; also a certain other deed of conveyance mentioned and described in the complaint in the above-entitled action Number 1, bearing date March 5, 1913, executed by Realty Realization Company, a corporation of the State of Maine, to Horace E. Walter, and recorded in the office of the Register of Deeds in and for Racine County aforesaid, on March 11, 1913, in Vol. 142 of Deeds on page 559; also a certain deed of trust or mortgage mentioned and described in the complaint in the above-entitled action Number 1, bearing date March 5, 1913, executed by Horace E. Walter to C. B. Munday, as trustee, and recorded in the office of the register of deeds in and for the County of Racine, aforesaid, on the 11th day of March, 1913, in Vol. 117 of Mortgages, on page 349—be, and the same are, and each of them, respectively, hereby is vacated, set aside and declared null and void as against the said Wisconsin Trust Company and the said Frederick Robinson and Lillian B. Robinson, their successors, heirs and assigns, respectively.

(2) That the records of said three deeds of conveyance, and of the trust deed or mortgage mentioned and described in the last preceding paragraph, namely: the deed from Wisconsin Trust Company to Realty Realization Company recorded in the office of the Register of Deeds in and for Racine County, Wisconsin, on March 11, 1913, in Vol. 142 of Deeds, on page 557,—the deed from Frederick Robinson and Lillian B. Robinson, his wife, to Realty Realization Company, recorded in the office of said Register of Deeds on March 11, 1913, in Vol. 135 of Deeds, on page 390;—the deed from
Realty Realization Company to Horace E. Walter, recorded
136 in the office of said Register of Deeds, on March 11, 1913, in Volume 142 of Deeds, on page 559; and the said trust deed from Horace E. Walter to C. B. Munday, as trustee, recorded in the office of said Register of Deeds, on March 11, 1913, in Volume 117 of Mortgages on page 349,—be and the same hereby are, and each of them hereby is cancelled and expunged and held for naught; and said deeds and the records thereof hereby are, and each of them hereby is, removed as clouds upon the title of the said Wisconsin Trust Company and Frederick Robinson in and to the premises described in the complaint in the above-entitled action Number 1.

(3) That the counter-claim set up in the separate answers of the defendant, Horace E. Walter, and the defendant, Realty Realization Company, to the complaint in the above-entitled action Number 1,

be, and the same hereby are, and each of them hereby is, dismissed upon the merits.

(4) That the complaint of C. B. Munday, as Trustee, La Salle Street Trust & Savings Bank, a banking corporation of the State of Illinois, and William C. Niblack, as Receiver thereof, plaintiffs, in the above-entitled action Number 2, be and the same is hereby dismissed upon the merits; and further, that the trust deed or mortgage from Horace E. Walter to C. B. Munday, as trustee, mentioned and described in the complaint in the above-entitled action Number 2, and the record thereof in the office of the Register of Deeds in and for Racine County, Wisconsin, in Volume 117 of Mortgages, on page 349, be and the same are hereby cancelled, expunged from the record and removed as clouds upon the title of the said Wisconsin
137 Trust Company and Frederick Robinson, of, in and to the premises described — said trust deed and hereinafter described.

(5) That Wisconsin Trust Company and Frederick Robinson, plaintiffs in the above-entitled action Number 1, at the time of the commencement of said action, on March 31, 1913, were and now are the owners in fee simple absolutely,—the former of the entire legal estate, and the latter of the entire equitable interest and estate, of, in and to the premises described in the complaint in said action Number 1, and hereinafter described, and their right and interest in said premises, as such owners in fee simple, is hereby declared and established.

(6) That Realty Realization Company, a corporation of the State of Maine, F. M. McKey, as Trustee in Bankruptcy of said Realty Realization Company, Horace E. Walter, C. B. Munday, as trustee, La Salle Street Trust & Savings Bank, a banking corporation of the State of Illinois, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, named as parties plaintiff, or defendant, or both, in the above-entitled actions, and all persons claiming under them, or any of them, subsequent to the filing of the Notice of the pendency of the above-entitled action Number 1, to-wit: June 9th, 1913, be and they are, and each of them is, hereby forever barred from any and all claim of right or title to the said premises, or lien thereon, or any part thereof.

(7) That F. M. McKey as trustee in bankruptcy of Realty Realization Company, a corporation of the State of Maine, defendant, in said above-entitled actions, do have and recover the sum of Five Thousand ($5,000) Dollars paid by the said Realty Realiza-
138 tion Company to the said Frederick Robinson, as part of the consideration for the premises described in the pleadings in the above-entitled actions, and by him tendered and paid into court herein, together with all interest accrued thereon since February 28th, 1913; also the promissory notes of said Realty Realization Company and the Common and Preferred Capital Stock of said corporation, received by the said Frederick Robinson as part of the consideration for said premises, and by him offered to be restored and tendered and deposited in this court, and that the clerk of this court on demand pay over the said money and interest, and deliver said

promissory notes and Preferred and Common Stock to the said F. M. McKey, as trustee in bankruptcy, aforesaid.

Eighth. That said Wisconsin Trust Company and Frederick Robinson have and recover from the defendant, Horace E. Walter, personally, and from Realty Realization Company and F. M. McKey, as its trustee in bankruptcy, to be collected from the estate of said bankrupt, their costs and disbursements in the above-entitled action Number 1, taxed at the sum of $278.04; and further that they have and recover from C. B. Munday, as trustee, La Salle Street Trust & Savings Bank, a banking corporation of the State of Illinois, and William C. Niblack, as Receiver thereof, their costs and disbursements in said above-entitled action Number 2, to be collected from the assets of said bank in the hands of said receiver,—taxed at the sum of $222.20; and in the taxation of above costs, it is ordered that the disbursements in the two actions be divided and pro rated, one-half to each case.

(9) The following is a description of the lands affected by this judgment, to-wit:

"All that certain lot or parcel of land situate in the City
139 and County of Racine, State of Wisconsin, and known as part of lots one (1) and two (2) in Block thirty-three (33) of the Original Plat of Racine, as surveyed by Moses Vilas, bounded as follows, namely: Begin at the Northeast corner of said Block 33, run thence west on the North line of said block forty-six (46) feet eight (8) inches, more or less, to the northeast corner of the premises conveyed on Dec. 2nd, 1862, by the First Baptist Church of Racine, Wisconsin, to Osborn & Osgood; thence south on the east line of the premises conveyed as aforesaid to said Osborn and Osgood (passing through the middle of the west wall of the church building) eighty (80) feet; thence east parallel with the north line of said block to the east line of said block; thence north on the east line of said block eighty (80) feet to the place of beginning."

Dated, Racine, Wisconsin, December 8th, A. D. 1917.

By the court:

JOHN C. HOOD, *Clerk*,
By HELEN L. BLYTHE,
Deputy Clerk.

Dock. G, 304.

Recorded in Judgment Book B, Page 478.

139*a*-893 (Indorsements:) Circuit Court, Racine County. Wisconsin Trust Co. et al., plaintiffs, vs. Realty Realization Co. et al., defendants. C. B. Munday et al., plaintiffs, vs. Horace E. Walter et al., defendants. Judgment. Simmons & Walker, Robinson Building, Racine, Wisconsin, Attorneys for Wisconsin Trust Co. Frederick Robinson. Filed Dec. 15, 1917. John C. Hood, Clerk Circuit Court. Filed Dec. 27, 1917. Arthue A. McLeod, Clerk of Supreme Court, Wis.

* * * * * * *

894–895 TRUSTEE'S EX. XX.

No. 1132.

WIS. TRUST CO.

vs.

REALTY REALIZATION —.

W. F. M.

UNITED STATES OF AMERICA,
The State of Wisconsin, Department of State:

To all to whom these presents shall come, Greeting:

I, J. S. Donald, Secretary of State of the State of Wisconsin, do hereby certify that The Realty Realization Company, a corporation of the State of Maine located at Portland in Cumberland County, State of Maine, having paid the sum of Seventy Five Dollars, the fee required by law, receipt whereof is hereby acknowledged, and having in all things complied with the requirements of the laws of this state pertaining to foreign corporations, is duly authorized to transact business, and to acquire, hold or dispose of property in this state, upon the following conditions: That such corporation shall not remove or make application to remove into any district or circuit court of the United States any action or proceeding commenced against it by any citizen of Wisconsin, upon any claim or cause of action arising within this State.

That such corporation shall file an annual report with the Secretary of State as provided for by paragraph seven of section one of chapter 562 of the laws of Wisconsin for the year 1907.

That such corporation shall not enter into any combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in the state, or constituting a subject of trade or commerce therein, or which shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state, or fix any standard or figure by which its price to the public shall be in any manner controlled or established.

That such corporation shall be subject to all the liabilities and restrictions that are or may be imposed upon corporations of like character, organized under the laws of this state, and shall be subject to all laws of this state relating to foreign corporations.

In testimony whereof, I have hereunto set my hand and affixed my official seal at the Capitol in the City of Madison, this fifth day of Oct. A. D. 1915.

[Seal of the Secretary of State of the State of Wisconsin.]

J. S. DONALD,
Secretary of State.

* * * * * * *

896-904 STATE OF WISCONSIN:

Circuit Court, Racine County.

WISCONSIN TRUST COMPANY and FREDERICK ROBINSON, Plaintiffs,

vs.

REALTY REALIZATION COMPANY, a Foreign Corporation; HORACE E. Walker, C. B. Munday, Trustee, and La Salle Street Trust & Savings Bank, a Foreign Corporation, Defendants.

C. B. MUNDAY, Trustee, and LA SALLE STREET TRUST & SAVINGS BANK, a Banking Corporation of the State of Illinois, Plaintiffs,

vs.

HORACE E. WALTER, WISCONSIN TRUST COMPANY, a Corporation; Frederick Robinson and Lillian B. Robinson, His Wife; David G. Janes, Receiver; Realty Realization Company, a Corporation Organized and Existing under the Laws of the State of Maine, and F. M. McKey, Trustee in Bankruptcy of Said Realty Realization Company, a Bankrupt, Defendants.

The plaintiffs C. B. Munday, Trustee, La Salle Street Trust & Savings Bank, and William C. Niblack, as receiver of the La Salle Street Trust & Savings Bank, in the foreclosure action, and the defendants C. B. Munday, Trustee, and La Salle Street Trust & Savings Bank, in the action instituted by the Wisconsin Trust Company and Frederick Robinson, each respectfully request that the Court make as findings of fact (The figures in parentheses refer to the original pages of the transcript of the testimony or deposition sustaining said requests) each of the following, that is to say:

* * * * * * *

905-925 29. That on October 5, 1915, the Realty Realization Company, having previously complied with Section 1770*b* Wisconsin Statutes, was duly licensed to transact business, and to acquire, hold and dispose of property, within the State of Wisconsin (468 Defts.' Ex. XX).

* * * * * * *

926-944 *Exceptions to Conclusions of Law.*

Said C. B. Munday, Trustee, the La Salle Street Trust & Savings Bank and William C. Niblack, as receiver of the La Salle Street Trust and Savings Bank, parties as aforesaid, jointly and severally except to the conclusions of law as follows:

1. They Except to the First conclusion of law.
2. They Except to the Second conclusion of law.
3. They Except to the Third conclusion of law.
4. They Except to the Fourth conclusion of law.
5. They Except to the Fifth conclusion of law.
6. They Except to the Sixth conclusion of law.
7. They Except to the Seventh conclusion of law.
8. They Except to the Eighth conclusion of law.

* * * * * * *

945-946 The foregoing constitutes all of the testimony and evidence offered, introduced and received upon the trial of said consolidated action.

STATE OF WISCONSIN,
Racine County, ss:

I, E. B. Belden, the Circuit Judge before whom said consolidated action was tried, do hereby certify that the above and foregoing bill of exceptions contains all the proceedings had and all the evidence and testimony offered, introduced, given and received upon th trial of said consolidated action. And to the end that the same and the whole thereof may be and become part of the record therein, I have settled and signed this bill of exceptions, this 16th day — February, A. D. 1918.

(Signed) E. B. BELDEN,
Circuit Judge.

Racine, Wis., Jan. 12, 1918.

(Signed) THOMPSON, MYERS & KEARNEY.
Attorneys for C. B. Munday, Trustee; La Salle Street Trust & Savings Bank, and Wm. C. Niblack, as Receiver of La Salle St. Trust & Sav. Bank.

JOS. W. MOSES AND
THOMAS M. KEARNEY,
Of Counsel.

* * * * * * *

947 And afterwards, to-wit, on the 5th day of April, A. D., 1918, the same being the 19th day of said term, the following proceedings were had in said cause in this court:

Racine Circuit Court.

WISCONSIN TRUST COMPANY et al., Respondents,

vs.

C. B. MUNDAY, Trustee, et al., Appellants; REALTY REALIZATION COMPANY, a Foreign Corporation, et al., Defendants.

C. B. MUNDAY, Trustee, et al., Appellants,

vs.

HORACE E. WALTER et al., Respondents.

Consolidated Action.

And now at this day came the parties herein by their attorneys, and this cause having been argued by Joseph W. Moses Esq. and Thomas M. Kearney Esq. for the said appellant, and by William E. Black Esq., John B. Simmons Esq. and E. B. Hand Esq. for the said respondents, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

948 And afterwards, to-wit on the 19th day of June, A. D. 1918, the same being the 34th day of said term, the judgment of this court was rendered in words and figures following, that is to say:

Racine Circuit Court.

WISCONSIN TRUST COMPANY and FREDERICK ROBINSON, Respondents,

vs.

C. B. MUNDAY, Trustee; LA SALLE STREET TRUST & SAVINGS BANK, a Foreign Corporation, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, Appellants; Realty Realization Company, a Foreign Corporation; F. M. McKey, as Trustee in Bankruptcy of said Realty Realization Company, and Horace E. Walter, Defendants.

C. B. MUNDAY, Trustee; LA SALLE STREET TRUST & SAVINGS BANK, a Banking Corporation of the State of Illinois, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, Appellants,

vs.

HORACE E. WALTER, WISCONSIN TRUST COMPANY, a Corporation; Frederick Robinson and Lillian B. Robinson, His Wife, David G. Janes, Receiver; Realty Realization Company, a Corporation Organized and Existing under the Laws of the State of Maine, and F. M. McKey, Trustee in Bankruptcy of said Realty Realization Company, a Bankrupt, Respondents.

(Consolidated Action.)

Opinion by Justice Rosenberry.

This cause came on to be heard on appeal from the judgment of the Circuit Court of Racine County, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Racine County, in this cause, be, and the same is hereby, modified as indicated in the opinion of the court, and as so modified that said judgment be, and the same is hereby, affirmed. The Wisconsin Trust Company and Frederick Robinson to tax one bill of costs against the appellants, taxed at the sum of One Hundred Eighty-eight and 70/100 Dollars ($188.70).

Kerwin and Eschweiler, JJ., dissent in part.
Vinje, J., dissents in part.

949 Thereupon the opinion of the Court by Justice Rosenberry and the dissenting opinion of Justice Eschweiler were filed in words and figures following, that is to say:

950 STATE OF WISCONSIN:

In Supreme Court.

No. 65.

Number 1.

WISCONSIN TRUST COMPANY and FREDERICK ROBINSON, Respondents,

vs.

C. B. MUNDAY, Trustee; LA SALLE STREET TRUST & SAVINGS BANK, a Foreign Corporation, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, Appellants.

Number 2.

C. B. MUNDAY, Trustee; LA SALLE STREET TRUST & SAVINGS BANK, a Banking Corporation of the State of Illinois, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, Appellants,

vs.

HORACE E. WALTER, WISCONSIN TRUST COMPANY, a Corporation; Frederick Robinson and Lillian B. Robinson, His Wife, David G. Janes, Receiver; Realty Realization Company, a Corporation Organized and Existing under the Laws of the State of Maine, and F. M. McKey, Trustee in Bankruptcy of said Realty Realization Company, a Bankrupt, Respondents.

Appeal from a Judgment of the Circuit Court for Racine County.

E. B. Balden, Circuit Judge.

There were originally two actions begun. The action here designated Number 1 was instituted by the Wisconsin Trust Company and Frederick Robinson, hereinafter called plaintiffs, to cancel, rescind and set aside two separate deeds given by each to the Realty Realization Company, all dated and delivered February 28, 1913,
951 pursuant to the contract between said parties, in which contract Clinton S. Woolfolk, President of the Realty Realization Company, joined as party of the third part, and also to cancel a deed given by said Realty Realization Company to the defendant Horace E. Walter, dated March 5, 1913, and a trust deed or mortgage given by Horace E. Walter to C. B. Munday, Trustee, dated March 5, 1913, to secure Walter's note for $50,000, upon the security of which there was loaned by the defendant La Salle Street Trust & Savings Bank the sum of $40,000, and to revest the title to the prem-

ises described in all the foregoing instruments in the Wisconsin Trust Company and Robinson free of all claims of the defendants therein.

The action designated Number 2 herein was instituted December 24, 1913, by the plaintiff Munday as Trustee, and the La Salle Street Trust & Savings Bank to foreclose the trust deed described above as a mortgage upon the premises pledged to secure said loan of $40,000 made by said bank to said Clinton S. Woolfolk, President of the Realty Realization Company, evidenced by the note of Horace E. Walter, dated March 6, 1913, for $50,000. The premises described are a lot and five story brick office and store building thereon, located in the city of Racine, Wisconsin, and worth between sixty and seventy-five thousand dollars. The actions by stipulation were tried as one. The plaintiff Robinson claimed that he was induced to enter into the contract of February 28, 1913, and to execute his deed and to procure the execution of the deed of the Wisconsin
952 Trust Company pursuant thereto by fraud; that the deed to Walter and the trust deed from Walter to Munday were given for the purpose of defrauding the plaintiff and hindering and delaying them in the recovery of the premises. This claim was practically abandoned upon the trial and is expressly abandoned in the briefs of counsel filed here, and will not be considered other than as it may bear upon the question of whether or not the conveyances made by the plaintiffs to the Realty Realization Company are void.

Plaintiffs further claim that the deeds given by them to the Realty Realization Company were absolutely void, because the Realty Realization Company being a corporation organized under the laws of the State of Maine had not complied with Sec. 1770*b* Stats.; that no title passed to said Realty Realization Company and it could therefore convey none to Walter; that Walter not having any title as against the plaintiffs could not give a valid mortgage to Munday, and that the defendants could not acquire any rights in the property by virtue of the subsequent transactions superior to the rights of the Wisconsin Trust Company and Robinson. On behalf of Munday, the Bank and Niblack, Receiver, hereinafter called appellants, it was claimed that there was no fraud; that Sec. 1770*b* Stats. had no application to the transaction because it was entirely negotiated and executed at Chicago, Illinois; that appellant Munday, Trustee, being an individual, and the La Salle Street Trust and Savings Bank were expressly excepted from Sec. 1770*b* Stats. with reference to the
953 loan, that said transaction having been negotiated and consummated long after the passage of Sec. 1770*j* Stats., the original transaction, if the statute had any application to executed contracts and unilateral instruments of transfer, was voidable only on a proper case made and not absolutely void; that the subject matter being property not within the state of Illinois, the Illinois foreign corporation law had no application to the transaction between the original parties; that the Trust Company and Robinson by the contracts and deeds in effect agreed that all persons claiming under the Realty Realization Company, including appellant, could not avoid the transaction and are estopped thereby from so doing; that the plaintiffs ratified and confirmed the contract of February 28, 1913, and their deeds given pursuant thereto; that Robinson, the owner of

the entire equitable title and interest in the premises, having placed the title in the control of the Realty Realization Company, a dealer in real estate, with knowledge that said property would be used by the latter in its business, was and is estopped and precluded from questioning the subsequent dealing by that company with said property, to the prejudice of the rights therein acquired by appellants. There was a trial by the court and the court found that the Realty Realization Company was guilty of fraud in the procurement of the contract and conveyances to it, but did not connect the appellants therewith; that the Bank loaned $40,000 on the trust deed
954 for which it issued its certificate of deposit, and that no part of the loan had been repaid; that Woolfolk discounted the certificates of deposit received by him on account of the loan on March 18, 1913, with James H. Prentiss and used part of the proceeds for the benefit of the Realty Realization Company, the balance being accounted for; that said certificates at or prior to the maturity thereof were paid by the bank to the holders who discounted the same for the said Clinton S. Woolfolk; that prior to the making of said loan the Realty Realization Company and Woolfolk were well known to the Bank and Munday and were depositors therein; that appellants Munday and the Bank were warned and put upon inquiry by the recitals contained in the deeds to the effect that the Realty Realization Company was a body corporate of the state of Maine, as to whether said company had complied with Sec. 1770*b* Wis. Stats., and that said appellants had failed to exercise ordinary care and prudence to ascertain whether said company had complied with the laws of Wisconsin, and that the Wisconsin Trust Company and Robinson had no knowledge that said company had failed to comply with Sec. 1770*b* until on or about March 30, 1913.

As conclusions of law the court found that the contract between Robinson and the Realty Realization Company and the deeds from the Trust Company and Robinson to the Realty Realization Company pursuant thereto were and are wholly null and void; that the realty Realization Company secured no title thereby, conveyed none to Walter, and that Walter's trust deed to Munday was and is a nullity; that Munday and the Bank were and are chargeable
955 with notice and knowledge of the invalidity of the title claimed by and through the Realty Realization Company, and that Robinson and the Trust Company are not estopped by any act or conduct on their part from asserting their title to said premises as against any of the other parties thereto; that the receiver of said Bank by virtue of said trust deed and the loan made thereon by said Bank, acquired no lien on the premises and no right to be subrogated to the Realty Realization Company; that F. M. McKey, Trustee in Bankruptcy of the Realty Realization Company, was entitled to the return of the consideration received from said company by Robinson for said conveyances; that plaintiffs were entitled to judgment for the relief prayed for in their complaint in action Number 1, and in action Number 2 to judgment dismissing on the merits appellants' complaint for foreclosure, vacating and setting aside the trust deed and removing same of record as clouds on their title and

quieting their title to the premises and for costs. Judgment was entered accordingly. Munday, La Salle Street Trust & Savings Bank, and Niblack, as receiver, appeal from the entire judgment. The appellants took proper exceptions to the findings made, made proper requests for other findings and assignments of error necessary to raise all the questions hereinafter considered. The case was thoroughly tried and ably presented both in this court and in the trial court. We shall not attempt a detailed statement of all the facts, as the record is a long one and it is not thought necessary in view of the disposition which we make of this case.

956 ROSENBERRY, *J.*:

The deeds given by the plaintiffs to the Realty Realization company were dated and delivered February 28, 1913, at which time the Realty Realization Company admittedly had not complied with the provisions of Sec. 1770*b* Stats. It is claimed that the failure of the Realty Realization Company to comply with the provisions of Sec. 1770*b* does not render the deeds absolutely void, for three reasons: (1) The business was not transacted in Wisconsin; (2) the transaction was interstate in character, and (3) the statute applies only to bilateral and executory agreements and does not apply to executed contracts.

Sec. 1770*b* has been considered in a series of cases beginning with Ashland Lumber Co. v. Detroit Salt Co., 114 Wis. 66, and ending with Phœnix Nursery Co. v. Trostel, 164 N. W. 995. No useful purpose would be served by again reviewing these cases.

Certainly the deeds in question are within the terms of this statute, for they clearly relate to property within this state. In the consideration of this case we regard as immaterial the fact that the contract was negotiated in the state of Illinois. No matter where negotiated it was a transaction relating to property within this state and under familiar principles its validity must be determined in accordance with the laws of this state. But it is claimed that because the business was transacted in the State of Illinois it is interstate in character because as a part of the transaction the Wisconsin
957 owner of the real estate in question received fifty shares of the common stock of the Maine corporation and by the terms of the contract was to receive seven hundred shares of the preferred stock of the corporation; that the law of Wisconsin can have no extra territorial effect and therefore cannot operate upon transactions negotiated and made outside of the state of Wisconsin.

It is true that the provisions of sec. 1770*b* do not apply to such contracts as relate to interstate commerce. Interstate commerce has as a necessary element the transportation of goods between states. We see no circumstances connected with this transaction from which it may be inferred that it was interstate in character, as that term is used in the law relating to interstate commerce.

Beaser v. Barber A. P. Co., 120 Wis. 599, and Laun v. Pacific Mutual Life Ins. Co., 131 Wis. 575, are cited as sustaining the proposition that sec. 1770*b* applies only to bilateral contracts and does not operate upon executed contracts. A large number of cases from

foreign jurisdictions are also cited to the same effect. This question, it seems to us, is clearly determined adversely to the appellants by the prior decisions of this court to which we must adhere. Hanna v. Kelsey Realty Co., 145 Wis. 276. Nearly every deed or conveyance is given pursuant to an antecedent contract written or oral and if the statute should be held not to apply to a deed given in performance of such antecedent contract its purpose would
958 be defeated. While the statute is in many respects a harsh one, it has nevertheless been upheld repeatedly by this court and thereafter reconsidered by the legislature in some of its aspects and no change has been made to avoid or modify the interpretation placed upon it by the court.

In Hanna v. Kelsey Realty Co., 145 Wis. 276, the statute was expressly held to apply to the conveyance of land in this state to a foreign corporation, and in this case it was also expressly held that a conveyance to a foreign corporation which had not complied with Sec. 1770*b* was absolutely void and not merely voidable. Upon the authority of the prior decisions of this court we must hold that the deeds given by the Wisconsin Trust Company and Frederick Robinson to the Realty Realization Company are absolutely and wholly void as to the Realty Realization Company and its grantees; that no title was conveyed thereby to the Realty Realization Company and that the subsequent deeds given are without legal force or effect, unless (1) the title to premises is confirmed in appellants by Sec. 1770*j* Stats. as amended by ch. 211 of the laws of 1917, or (2) unless plaintiffs are estopped to claim the benefit of sec. 1770*b*. It is undisputed that on February 28, 1913, Robinson entered into a contract with the Realty Realization Company, party of the second part, and Clinton S. Woolfolk, party of the third part, by the terms of which Robinson agreed to procure from the Wisconsin Trust Company a conveyance of the premises in question to the Realty Realization Company, in consideration for which the Realty Real-
959 ization Company was to pay the sum of $75,000, $5,000 in cash upon delivery of the deeds, and the balance according to the terms of six promissory notes, the payment of which was to be secured by the deposit of preferred stock of the Realty Realization Company as collateral security. The contract also gave to Robinson an option to purchase certain stock of the Realty Realization Company within the time and upon the terms therein specified, and included other details of the transaction. This contract was delivered on February 28, 1913, the deeds in question being delivered at the same time as part of the same transaction. The Realty Realization Company had at that time not complied with the provisions of sec. 1770*b*, but on October 5, 1915, it did comply with the terms of said section and was duly licensed and authorized to transact business and to acquire and hold property within this state. That part of sec. 1770*b* material here is as follows:

"2. No corporation, incorporated or organized otherwise than under the laws of this state, except railroad corporations, corporations or associations created solely for religious or charitable purposes, insurance companies and fraternal or beneficiary corporations, so-

cieties, orders and associations, furnishing life or casualty insurance or indemnity upon the mutual or assessment plan, shall transact business or acquire, hold or dispose of property in this state until such corporation shall have caused to be filed in the office of the Secretary of State a copy of its charter, articles of association or incorporation and all amendments thereto duly certified by the Secretary of State of the state wherein the corporation was organized. * * * Nothing in this section shall be construed to prevent foreign corporations from taking or holding mortgages or trust deeds on property in this state to secure payment of money loaned or advanced. Mortgages or trust deeds heretofore taken by foreign corporations to secure the payment of money loaned or advanced are hereby declared valid."

"Every contract made by or on behalf of any such foreign corporation, affecting the personal liability thereof or relating to
960 property within this state, before it shall have complied with the provisions of this section shall be wholly void on its behalf and on behalf of its assigns, but shall be enforcible against it or them."

It having been held in Ashland Lumber Co. v. Detroit Salt Co., 114 Wis. 66, and other cases, notably Hanna v. Kelsey Realty Co., 145 Wis. 276, that contracts entered into with foreign corporations which had not complied with sec. 1770*b* were wholly void and not voidable, there was enacted ch. 142 of the laws of 1911, which took effect May 13, 1911, the material parts of which are as follows:

"Section 1. There is added to the statutes a new section to read: Section 1770*j*. 1. Any corporation organized otherwise than under the laws of this State, having acquired or attempted to acquire, legal title by deed, or lease to any real property in this state, before complying with the terms of Sec. 1770*b* of the statutes, or acts amendatory thereof, and which has thereafter, and before the passage of this act, complied with said section, shall be and is hereby relieved from any disability provided in said statute or prohibition therein contained, so far as said section relates to the acquisition and holding of the property so acquired, or attempted to be acquired.

2. Any person claiming that the legal title of any corporation or of any person claiming by, through or under such corporation, to any real property acquired, or attempted to be acquired, is invalid by reason of the failure of any corporation coming within the terms of sub-section 1 of this act, to comply with section 1770*b* of the statutes or acts amendatory thereof, shall commence action to recover the property, or to declare the legal title of said corporation void, or interpose a defense on such grounds, within one year from the passage and publication of this act, and in case of failure to do so his right of action or defense, based upon the failure to comply with said section by any such corporation, shall be deemed to have expired; provided that this act shall not affect any action now pending."

Section 1770*j* as enacted by ch. 142 of the laws of 1911, was amended by ch. 212 of the laws of 1913. We do not determine in this case what effect, if any, the enactment of ch. 212 of the
961 laws of 1913 had as to title attempted to be conveyed to corporations which complied with sec. 1770*b* after the passage of

ch. 142 of the laws of 1911 and prior to the enactment of ch. 212 of the laws of 1913. Manifestly ch. 212 of the laws of 1913 could not operate to validate the contract and deeds in question in this case, as the Realty Realization Company had not complied with the provisions of sec. 1770*b* prior to the passage of ch. 212. After the case had been tried and while it was still under advisement and undecided, secs. 1770*b* and 1770*j* were amended by the enactment of ch. 211 of the laws of 1917. Said sections as amended by ch. 211 are as follows, that part incorporated by the enactment of ch. 211 being italicized:

"Section 1. Subsection 2 of section 1770*b* and subsection 1 of section 1770*j* of the statutes are amended to read: (Section 1770*b*) 2. No corporation, incorporated or organized otherwise than under the laws of this state, except railroad corporations, corporations or associations created solely for religious or charitable purposes, insurance companies and fraternal or beneficiary corporations, societies, orders and associations furnishing life or casualty insurance or indemnity upon the mutual or assessment plan, *or corporations not organized or conducted for profit* shall transact business or acquire, hold or dispose of property in this state until such corporation shall have caused to be filed in the office of the Secretary of State a copy of its charter, articles of association or incorporation and all amendments thereto, duly certified by the Secretary of State of the state wherein the corporation was organized * * * and provided, further, that except as regards the advancing and loaning of money and the taking, acquiring, holding and enforcing of securities, as above provided, nothing herein contained shall be construed as authorizing any foreign corporation to transact in this state the business of a bank or trust company, or otherwise to exempt any foreign corporation (other than the railroad, religious, charitable and insurance corporations *and corporations not organized or conducted for profit* above specified) from the provisions of this section or other statutes of this state. Nothing in this section contained shall affect the rights of parties in any action which may now be pending.

(Section 1770*j*) 1. Any corporation organized otherwise than under the laws of this state, having acquired or attempted to acquire, legal title by deed, or lease to any real property in this state, before complying with the terms of section 1770*b* of the statutes,
962 *and which is now not required to comply with said section* or which has thereafter, and before the passage of this section complied with said section, shall be and is hereby relieved from any disability provided in said statute or prohibition therein contained, so far as said section relates to the acquisition and holding of the property so acquired, or attempted to be acquired, and the title so acquired, or attempted to be acquired, is hereby confirmed."

The appellants claim that by the enactment of ch. 211 of the laws of 1917, the title of the Realty Realization Company and its grantees to the property in question was confirmed and validated. The plaintiffs claim that the enactment of said law did not affect the situation for the reason that the Realty Realization Company is not within the terms of said chapter. Chapter 211 of the laws of 1917

consisted of two sections, the first incorporated the provisions of secs. 1770*b* and 1770*j* as amended and the second provided when the act should take effect.

The controversy turns upon what is meant by the language used in that part of the first section amending sec. 1770*j* as follows: "Any corporation organized otherwise than under the laws of this state, having acquired, or attempted to acquire legal title by deed or lease to any real property in this state before complying with the terms of section 1770*b* of the statutes, and which is now not required to comply with said section or which has thereafter, and *before the passage of this section* complied with said section, shall be and is hereby relieved," etc. Do the words "before the passage of this section" refer to sec. 1 of ch. 211 of the laws of 1917 or do they refer to the passage of sec. 1770*j*? In other words, did the legislature intend by the enactment of ch. 211 of the laws of 1917 to
963 confirm and validate all titles attempted to be acquired by foreign corporations prior to the enactment of sec. 1 of that act, or did it intend by the amendment to sec. 1770*b* and the first subsection of sec. 1770*j* to exempt "corporations not organized or conducted for profit" from the provisions of sec. 1770*b* and to confirm the titles attempted to be acquired by a corporation "which is now not required to comply with said section?"

In determining this question we must search for the intention of the legislature, and if that be ascertained it is our duty to give it effect within established rules. In ascertaining the legislative intention there is one consideration which we think is of controlling force in this case: If the legislature had intended by the reenactment of subsection 1 of section 1770*j* to confirm and validate the title theretofore attempted to be acquired by all foreign corporations which had not complied with sec. 1770*b*, it could have had no object in amending sec. 1770*j*, because the words "any corporation organized other than under the laws of this state" would include "corporations not organized or conducted for profit," which were exempted from compliance with sec. 1770*b* by the enactment of ch. 211. Therefore, the insertion of the words in sec. 1770*j*, "which is now not required to comply with said section," would be superfluous, because such corporations would be properly described in the first part of subsec. 1 of sec. 1770*j*. As used in sec. 1770*j* we think the words "this section" in the phrase "and before the passage of this section." refer to the enactment of sec. 1770*j* and not to sec. 1 of ch.
964 211, Dallmann v. Dallmann, 159 Wis. 480. The re-enactment of sec. 1770*j* for the purpose of admitting a new class of corporations, to-wit, that "which is not now required to comply with said section," did not and was not intended to bring within the provisions of that section all corporations which had complied with the law subsequent to the passage of ch. 142 of the laws of 1911 which created and enacted sec. 1770*j*. The words "before the passage of this section" are not a part of the amendment, but are a part of sec. 1770*j* as it was originally created. The repetition of language in an amending statute which provides that the original section shall be amended to read as follows, does not repeal and re-enact the re-

peated language, but the repeated part remains in force as of the time of the original enactment, in the absence of a clearly expressed legislative intent to the contrary.

The Realty Realization Company was admittedly not "a corporation not organized or conducted for profit," as that term is used in sec. 1770*b*, and therefore is not exempted from complying with sec. 1770*b* and is not included within the language "which is now not required to comply with said section." As stated before, we do not determine the effect of the enactment of ch. 212 of the laws of 1913, but in arriving at the conclusion stated above we have carefully considered the arguments based on the terms of that statute as indicating the intent and purpose of the legislature in the re-enactment from time to time of sec. 1770*j*.

965 Because the title attempted to be acquired by the deeds delivered February 28, 1913, was not confirmed and validated by the enactment of ch. 212 of the laws of 1917, we think the conclusion of the trial court that said deeds were void and conveyed no title is correct and should be affirmed.

Appellants claim that plaintiffs are estopped to claim the benefits of sec. 1770*b*. It is admitted that the Wisconsin Trust Company was a bare trustee; that Robinson had the right to direct a conveyance of the property at such time and upon such terms and conditions as he chose. The claim of estoppel is based upon the following propositions: (1) The right to annul a contract made with a foreign corporation which has not complied with sec. 1770*b* is a purely personal right as to which no question of public interest attaches; (2) the right claimed by Robinson being purely personal in character will not be enforced if such enforcement would be inequitable; (3) Robinson is estopped by the character, form and conditions of the contract and deeds involved herein from having the remedy he seeks; (4) Robinson is estopped from avoiding the transactions in this case by reason of the fact that by the transaction he became and was a stockholder of the Realty Realization Company; (5) Robinson should be estopped, because as a stockholder of the Realty Realization Company with full knowledge that his grantee was about to deal with the title to the property conveyed he stood by without concern and permitted the title to be pledged for the debt admittedly owing to C. B. Munday as trustee for the bank.

966 It cannot fairly be said that no question of public policy is involved in the determination of this question. It is clear that sec. 1770*b* is a declaration of a public policy of this state with reference to the transaction of business within the state by a foreign corporation. If we permit the provisions of that law to be whittled away and diminished from time to time in order to give effect to private rights, the whole legislative purpose will be defeated. While it has been said in Mortenson v. Murphy, 153 Wis. 689, that the person there referred to "did not want to take advantage of a technicality which would permit him to sell the premises a second time, and he deeded to the bank, the then holder of the mortgage, for the apparent purpose of validating the attempted transfer of the property by the corporation," and in Bennington County Savings Bank

v. Lowry, 160 Wis. 661, that "a party has no vested right in a defense based upon an informality not affecting his substantial equities," it does not follow from the language of these decisions that no matter of public interest is involved in a case such as the one before us. If we apply to situations such as the one presented here the doctrine of estoppel contended for by appellants, the whole statute would be practically avoided. We have already set out the terms of the contract pursuant to which the deeds in question were issued, and it is admitted that the contract was fully performed, and that pursuant to the terms of said contract Robinson directed the Trust Company to convey the property to the Realty Realization Company; that pursuant to such direction the Trust Company
967 acknowledged its deed made under the authority recited; that the deed contained a special covenant of warranty as against all persons claiming under the Trust Company; that Robinson and wife made their deed confirming the title conveyed to the Trust Company, in which they included a special covenant of warranty as against any person claiming through or under them, said deeds being in the usual form and the covenants running in each instance to the grantee, its successors and assigns; that as a part of the transaction Robinson secured the guaranty of Woolfolk to the notes given for part of the purchase price, and it is claimed that by the making and delivery of the deeds Robinson elected to affirm the contract and validated it within the provisions of sec. 1770*b*, and he cannot now be permitted to claim to the contrary.

As has been pointed out, practically speaking, every deed is made and delivered in execution of some prior oral or written contract. Besides that in this case it clearly appears that the making of the contract and the execution and delivery of the deeds, the payment of the money and the execution of the notes constituted a single transaction. How can it be said that the covenants of warranty contained in the very instrument made void are or can be a ratification of the making of the deed itself?

The delivery took place on February 28, 1913; Woolfolk died suddenly on March 28, 1913, and on that day notices were served by Robinson asserting the invalidity of the conveyances on the ground that the Realty Realization Company had failed to
968 comply with sec. 1770*b*, and on March 31 a second notice signed by Robinson and the Wisconsin Trust Company was placed of record in the office of the Register of Deeds of Racine County, and on March 31 an action of ejectment was brought against Horace E. Walter, holder of the title as it then stood of record. The plaintiffs moved with commendable promptness.

While it is true that the transaction contemplated that the property attempted to be conveyed should be reconveyed by the Realty Realization Company which was a dealer in real estate, we see no significance in the fact. The purpose of every conveyance is to enable the grantee to deal with the property as his own. The purpose of the statute is manifestly to compel foreign corporations to comply with its terms before transacting business within this state or attempting to hold or acquire property situated within this state.

We think the contentions made here, although presented as they are with great clearness and ability, are disposed of by the prior decisions of this court. In nearly all or every imaginable case all or some of the circumstances here urged as grounds for estoppel are present. In Hanna v. Kelsey Realty Co., supra, the foreign corporation was found to be a purchaser in good faith for a valuable consideration, nevertheless, the conveyance was held void and the grantor not estopped. While it has been well said the law is a harsh one, may prove inequitable and result in injustice to private parties, nevertheless it is the declared law of the state, its constit-ionality has been passed upon by this Court as well as by the Supreme
969 Court of the United States, and we are bound to give it effect according to its terms; and we cannot say that in one case it shall have a certain effect because some private right has intervened and in another case it shall have a different effect because some other private interest is involved, but it is our duty to give it effect according to the legislative intention.

It is claimed that the enactment of ch. 142 of the laws of 1911 makes a change in the legislative policy of this state in view of the decision of this court in Hanna v. Kelsey Realty Company, 145 Wis. 276. This chapter was considered in Lanz-Owen & Co. v. Garage Equipment Mfg. Co., 151 Wis. 555. We see nothing in the enactment of that chapter to indicate any intention or purpose on the part of the legislature to relieve corporations thereafter transacting business or acquiring property within this state from complying with sec. 1770*b*. Had such been the legislative purpose it could very easily have been stated. On the other hand the legislature failed to change the terms of sec. 1770*b* as interpreted in Hanna v. Kelsey Realty Company, but chose to relieve those who prior thereto had inadvertently or mistakenly supposed sec. 1770*b* not to be applicable to their particular situation, by the enactment of ch. 142. This does not indicate a purpose to change the legislative policy of the state, but rather to adhere to it.

Holding as we do that the deeds in question were void and
970 not voidable, we need not consider whether or not the Bank or Munday failed to exercise ordinary care with respect to the ownership of the property in question. It is manifest that the void deed conveyed no title, the subsequent conveyances of the Realty Realization Company to Walter conveyed none, and that matter need not be further considered.

It is claimed that sec. 1770*b* and sec. 1770*j* are unconstitutional and void in that they violate the provisions of the constitution of the state of Wisconsin and the federal constitution, and that the judgment of the Circuit Court in failing to give force and efficacy to sec. 1770*j* Stats. as amended by ch. 212 of the laws of 1917, infringed the rights, privileges and immunities of the appellants under the applicable sections of the federal constitution, and that the judgment of the Circuit Court declaring said deeds void, which is here affirmed, impairs the obligation of said contract, contrary to the applicable provisions of the constitution of the State of Wisconsin and of the federal constitution; that by holding sec. 1770*b* and sec. 1770*j* of the

Wisconsin statutes, as amended as construed by this court, valid, which holding is here affirmed, the trial court infringed the rights of the appellants under the applicable provisions of the federal and Wisconsin constitutions. We think these contentions have been disposed of in the prior decisions of this court and by the Supreme Court of the United States, and we shall not consider them further than to say that we have carefully examined them and are of the opinion that the decision of the trial court upholding said pro-
971 visions, which is affirmed by this Court, in no respect contravene any of the provisions of the constitution of this state or of the United States. Ashland Lumber Co. v. Detroit Salt Co., 114 Wis. 66; Diamond Glue Co. v. United States Glue Co., 187 U. S. 611.

In Duluth Music Co. v. Clancey, 139 Wis. 189, 194, the court said: "There is doubtless a limit beyond which the law cannot go in holding one party to an illegal contract bound and the other free, but that the limit is not reached or passed in a case where this provision can be considered an additional penalty on that party for violation of law." It is claimed that by the use of this language this court has placed an interpretation upon the act which makes it unconstitutional, it having been held in Lanz-Owen Co. v. Garage Equipment Mfg. Co., 151 Wis. 555, that a conveyance to an unlicensed corporation was not absolutely void, but was voidable merely at the election of the other contracting party; it being claimed that the power to impose this additional penalty for the doing of the prohibited act lies with a private citizen and may be imposed or not at his whim or caprice, and that the delegation of legislative power to a private individual to impose a penalty or not at his election renders the act unconstitutional and void.

The language of these decisions fairly construed is not subject to this interpretation. On behalf of the corporation and its assigns the contract is by the express provisions of the section absolutely void. That the character of the contract on behalf of the offending corporation is not altered or changed by its enforcement by the
972 other party, is abundantly established by the prior decisions of this court. In Rib Falls Lumber Co. v. Lesh & Mathews Lumber Co., 144 Wis. 362, it was distinctly held that while the plaintiff had a right to enforce its contract against a foreign corporation and even if it exercised that right the foreign corporation could not assert its rights under the same contract by way of counterclaim, but that it might show by way of defense that it had not received the goods contracted for and for the purchase price of which it was being sued. In Phœnix Nursery Co. v. Trostel, 164 N. W. 995, the plaintiff had sold certain nursery stock to the defendant and as part of the contract had agreed to plant the trees and shrubs on the premises of the defendant, plaintiff having its nursery at Bloomington, Illinois, and the defendant living at Milwaukee, Wisconsin. There was a dispute, plaintiff brought suit, and the only defense made was that plaintiff had not complied with sec. 1770*b*, the claim of plaintiff being that the transaction constituted interstate commerce and that it was therefore exempt from the provisions of the statute. Following Browning v. Waycross, 233 U. S. 16, this court held that the

transaction did not constitute interstate commerce in view of the agreement to plant the trees and shrubs, and in response to claim of counsel that defendant should not be permitted to retain the benefits of the contract and then be relieved from the burden, the Court said:

"We fully concur in the view called to our attention by counsel for plaintiff that courts should not without good cause permit parties to reap the benefit of their contracts and then be relieved from
973 their burdens. Where, however, a constitutional legislative declaration is explicit in declaring a prohibited contract void and the case is clearly within the prohibition, courts have but one course to pursue, and that is to enforce the statute."

We think this disposes of the question raised by appellants, and while, as pointed out by the late Justice Timlin, the language used, if considered apart from the text, may form a basis for the claim made, we think that the decisions in Hanna v. Kelsey Realty Co., supra, and Lanz-Owen Co. v. Garage Equipment Mfg. Co., supra, are not inconsistent with the other decisions of this court, and that it is clear that the contract does not become void or not at the election of the opposite party, but is void by the terms of the statute, and that the law has been so construed by this court from the beginning. To be sure, the opposite party may at his election enforce it, but so far as it is a contract in favor of or on behalf of the offending corporation, it is void.

The statute has been repeatedly applied to executed contracts, as in Hanna v. Kelsey Realty Company, supra, where the deed to the foreign corporation had been delivered and the price paid, the corporation being admittedly an innocent purchaser. The grantor had in no manner repudiated the conveyance or sought to recover the property, and the court held the deed void at the instance of a third party. And in Indiana Road Machine Co. v. Lake, 149 Wis. 541, a rock crusher had been delivered to and accepted by the town officers and town orders had been issued in payment, yet the contract was declared void. Again in Mortenson v. Murphy, 153 Wis. 389, a deed to a foreign corporation was declared void although the contract was fully executed and the purchase money paid.

974 There remains to be considered the disposition of the $5,000 paid by the Realty Realization Company under the contract of February 28, 1913, to the plaintiff Robinson. While the Realty Realization Company acquired no title to the realty in question and conveyed none to Walter and therefore Walter had no title which he could mortgage to the bank, we think as between the Realty Realization Company and the Receiver of the bank, under the settled maxim that equity considers that done which ought to be done, and the Realty Realization Company having through Walter in fact mortgaged its interest in the premises, if any, to Munday as trustee for the bank, the $5,000 in equity and good conscience belongs to the bank and William C. Niblack, its receiver, and the judgment of the Circuit Court is modified accordingly. Mr. Robinson to whom the sum was paid agrees to repay the amount to whomsoever the court shall find entitled thereto. A similar disposition should be made of

the notes, stocks and securities which he received from the Realty Realization Company.

By the Court: The judgment of the Circuit Court is modified as stated in the opinion and as so modified is affirmed. The Wisconsin Trust Company and Frederick Robinson to tax one bill of costs against the appellants.

Kerwin and Eschweiler, JJ., dissent in part.
Vinje, J., dissents in part.

975 STATE OF WISCONSIN:

In Supreme Court.

No. 65.

WISCONSIN TRUST COMPANY et al., Respondents,

vs.

C. B. MUNDAY, Trustee, et al., Appellants.

ESCHWEILER, *J.* (dissenting in part):

As between the grantor of the real estate, Robinson, who conveyed knowing it was in effect to be used for trading purposes, and the La Salle Street Trust & Savings Bank, who advanced the $40,000 upon the strength of such conveyance, I think that Robinson should be estopped from taking advantage of the statute relied upon.

KERWIN, *J.*:

I concur in the foregoing dissenting opinion of Justice Eschweiler.

976 And thereafter the said appellants filed their motion for rehearing in said cause and an order was entered retaining the record until the determination of said motion, which motion was in words and figures as follows, that is to say:

977 STATE OF WISCONSIN:

In Supreme Court.

No. 65.

Number 1.

WISCONSIN TRUST COMPANY and FREDERICK ROBINSON, Respondents,

vs.

C. B. MUNDAY, Trustee; LA SALLE STREET TRUST & SAVINGS BANK, a Foreign Corporation, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, Appellants,

Number 2.

C. B. MUNDAY, Trustee; LA SALLE STREET TRUST & SAVINGS BANK, a Banking Corporation of the State of Illinois, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, Appellants,

vs.

HORACE E. WALTER, WISCONSIN TRUST COMPANY, a Corporation; Frederick Robinson and Lillian B. Robinson, His Wife; David G. Janes, Receiver; Realty Realization Company, a Corporation Organized and Existing under the Laws of the State of Maine, and F. M. McKey, Trustee in Bankruptcy of said Realty Realization Company, a Bankrupt, Respondents.

Petition and Motion of C. B. Munday, Trustee; La Salle Street Trust & Savings Bank, a Corporation, and William C. Niblack, as Receiver of the La Salle Street Trust & Savings Bank, Appellants, for a Rehearing in the Above Cause.

Now come the appellants, C. B. Munday, Trustee, La Salle Street Trust & Savings Bank, a Corporation, and William C. Niblack, as Receiver of said La Salle Street Trust & Savings
978 Bank, by Thompson, Myers & Kearney, their solicitors, and Thomas M. Kearney and Joseph W. Moss, their counsel, and petition and move this Honorable Court, pursuant to the rules of said court in such case made and provided, to vacate and set aside the judgment of affirmance entered in the above entitled cause, and to grant a rehearing therein; and as and for grounds and reasons for said petition and motion, appellants state and show to the court the following:

1. That the opinion of this Honorable Court, filed herein, shows (A) That this court has misconceived and misapprehended the

proper construction and effect of Section 1770*j* of the Laws of 1917, in so far as the same are applicable to the appellants.

(B) That this court has erroneously assumed that the question involved is, whether the words "before the passage of this Section," used in said amendatory Act, refer to Section 1 of Chapter 211 of the Laws of 1917, or refer to the passage of Section 1770*j*, and whether the Legislature intended, by the enactment of Chapter 211 of Laws of 1917, to confirm and validate all titles attempted to be acquired by foreign corporations prior to the enactment of
979 Section 1 of that Act, or intended by the amendment to Section 1770*b* and the first subsection of Section 1770*j* to exempt "corporations not organized or conducted for profit" from the provisions of Section 1770*b*, and to confirm the titles attempted to be acquired by a corporation "which is not now required to comply with said section," when, as a mattter of fact, the question involved, as contended by appellants, is whether the Legislature did not intend, by the enactment of Chapter 211 of the Laws of 1917, to confirm and validate all such titles attempted to be acquired by both such classes of corporations, i. e., foreign corporations for profit, applying prior to the enactment of Section 1 of the amendatory Act, as well as foreign corporations not organized or conducted for profit, exempted by the amendment of Section 1770*b* by subsection 1 of the amendatory Act.

(C) That the insertion of the words in Section 1770*j* "which are not now required to comply with said Section," would be superfluous if the Legislature had intended by the enactment of subsection 1 of Section 1770*j* to confirm and validate the titles theretofore attempted to be acquired by all foreign corporations which had not complied with Section 1770*b*, because such corporations would be properly described in the first part of subsection 1 of Section 1770*j* and included in the words thereof, "any corporation organized under the laws of this State," when, as a matter of fact, the failure to include the words "which is not now required to comply with this
980 section," would not have validated titles of non-profit sharing corporations not complying with Section 1770*b* prior to the passage of the amendatory Act of 1917, because such amendatory Act would, in that event, only have confirmed titles of those corporations, whether profit-sharing or non-profit-sharing, which had, prior to the passage of the amendatory Act and since acquiring titles, complied with Section 1770*b*. It was the obvious purpose of the Legislature to confirm the titles of non-profit-sharing corporations which had not complied with Section 1770*b*, and which were by the amendment of Section 1770*b*, by subsection 1 of the Act of 1917, in express terms exempted from the provisions of Section 1770*b*.

(D) That the words "before the passage of this Section" are not a part of the amendatory Act of 1917, but are a part of Section 1770*j* as it was originally created, when, as a matter of fact, Section 1770*j*, as originally created and as quoted in the opinion, used and employed the phrase "and before the passage of this act," (meaning the Act of May 13, 1911, consisting of two sections), in consequence of and on which language appellants in part base their contention

that the use of the phrase "and before the passage of this Section," indicated an intention of the Legislature to confirm the titles of all foreign corporations complying with Section 1770*b* before the passage of the amendatory Act of 1917. In other words, the
981 court, in arriving at the intention of the Legislature, proceeds, it is respectfully submitted, on an entirely erroneous premise, hence making inapplicable the principle of statutory construction that "the repetition of language in an amending statute which provides that the original section shall be amended to read as follows, does not repeal and re-enact the repeated language, but the repeated language remains in force as at the time of the original enactment, in the absence of clearly expressed legislative intent to the contrary," it being contended by appellants that this intent is evidenced by the change and substitution of the word "section" in the last Act, for the word "Act" in the original Act of 1911.

2. That the opinion and judgment of this Court, in failing to give due force and efficacy to Chapter 211 of the Laws of 1917, by applying said curative statute to the legal status of the Realty Realization Company and its successor in title, as respects the title to the property in question, (said Company having concededly complied with Section 1770*b* on October 5, 1915), and in denying appropriate relief in said actions, deprived the appellants, and each of them, of their property without due process of law, impaired the obligations of the contract and deeds under and by virtue of which said title was acquired by the Realty Realization Company, deprived appel-
lants, as citizens of the State of Illinois, of privileges and
981½ immunities granted to citizens of the State of Wisconsin, and abridged the privileges and immunities of appellants and of the Realty Realization Company (their predecessor in title), as citizens of the United States, by applying to said appellants and said Realty Company, and to the contract and deeds in controversy, the provisions of Section 1770*b* of the Wisconsin statutes, contrary to and in violation of the rights, privileges and immunities granted under Section 10 of Article I and Section 2 of Article IV of the Constitution of the United States and the fifth and fourt*h*eenth amendments thereto, and under Section 1 of Article I, Section 9 of Article I, Section 22 of Article I and Section 1 of Article IV of the constitution of Wisconsin.

That the trial court likewise, by its judgment, deprived the appellants and the Realty Realization Company of the same rights, privileges and immunities, contrary to the guaranties of said several Sections and Articles of the Constitution of the United States, and the amendments thereto, above referred to, and of the Sections and Articles above referred to of the constitution of the State of Wisconsin.

3. That this Court has misconceived and misapprehended the grounds upon which appellants contend that Section 1770*b* of the Wisconsin statutes is unconstitutional and void, and in erroneously assuming that the decision of this Court in Ashland Lumber Com-

pany v. Detroit Salt Company, 114 Wis. 66, and of the Su-
982 preme Court of the United States in Diamond Glue Company v. United States Glue Company, 187 U. S. 611, passed upon and foreclosed a re-consideration of the grounds of unconstitutionality asserted and relied upon by appellants, whereas the contrary is the case.

Said grounds of unconstitutionality are:

(*a*) That Section 1770*b*, as construed by this court, in making contracts and conveyances void as to a non-complying foreign corporation and its assigns, while leaving it valid and enforcible as against the corporation and in favor of the other contracting parties, violates the provisions of Section 2, subsection first, of Article IV of the Constitution of the United States, providing that the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States, and Section 1 of the fourteenth amendment of the Constitution of the United States, providing that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of property without due process of law.

(*b*) That said Section 1770*b* of the Wisconsin statutes, as construed by this court in Duluth Music Company v. Clancey, 139 Wis. 126, Lands-Owen Company v. Garage Equipment Mfg. Company,
151 Wis. 555, Allen v. Fuiton, 167 N. W. (Wis.) 429, and
983 Mortenson v. Murphy, 153 Wis. 389, being a statute under which the party contracting with a non-complying foreign corporation may elect to affirm or disaffirm a contract with such non-complying foreign corporation, and such right of disaffirmance having been held to be an additional penalty imposed on the offending corporation, the right of imposing or withholding of such additional penalty, under said statute, is delegated by the Legislature to a private individual, and the application of said statute as to all citizens in the same situation is not made of uniform operation, its application is made dependent upon the action or inaction of a private person, contrary to the constitutional guaranties contained in the sections and provisions of the federal Constitution last hereinbefore referred to.

4. That the judgment and opinion of this Honorable Court, in holding the contract and deeds in question void, are at variance and inconsistent with the prior decisions of this court in Lands-Owen Company v. Garage Equipment Mfg. Co., 151 Wis. 555, Mortenson v. Murphy, 153 Wis. 389, and Allen v. Fulton, 167 N. W. (Wis.) 429, all of which hold that transactions by a non-complying foreign corporation are not void, but voidable merely at the election of the party dealing with the corporation.

If, as held in the three cases above cited, the transaction is voidable merely at the election of the other contracting party,
984 and not void, then the conclusion of this court in the opinion at bar, that appellants can not rely upon or prevail in the contentions of estoppel by deed and estoppel in pais and ratification, in the various respects urged, is, it is respectfully submitted, unsound.

5. That this court, while stating and recognizing appellants' contentions as to estoppel in pais, ignores and fails to dispose of such contentions in the opinion at bar. Some of the contentions so ignored are:

(*a*) "Robinson is estopped from avoiding the transaction in this case, by reason of the fact that by the transaction he became and was a stockholder of the Realty Realization Company."

(*b*) Robinson should be estopped because, as a stockholder of the Realty Realization Company, with full knowledge that his grantee was about to deal with the title to the property conveyed, he stood by without concern and permitted the title to be pledged for the debt admittedly owing to C. B. Munday, as trustee of the Bank."

(*c*) "That the right claimed by Robinson, being purely personal in character, will not be enforced if such enforcement will be inequitable."

(*d*) That inasmuch as the contract in question was not performed by the execution of valid conveyances, as now held, Robinson should be foreclosed from any claim to the property, by the application of the equitable maxim (recognized by the opin-
985 ion), that "equity considers that done which ought to be done."

The doctrine of estoppel in pais might well be applied to the facts in this case without having the effect of avoiding the whole statute.

Wherefore, appellants pray that a re-hearing be granted herein, that the judgment of affirmance be vacated and set aside, and that upon such further hearing, the judgment of the trial court be reversed, with directions to enter a judgment as prayed in appellants' original brief filed herein.

THOMPSON, MYERS & KEARNEY,
Solicitors for Appellants.

THOMAS M. KEARNEY,
JOSEPH W. MOSES,
Of Counsel.

986 Please take notice that a motion of which the within annexed copy is a true copy, on behalf of the defendants and appellants La Salle Street Trust & Savings Bank and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank, for a rehearing before said named court on said appeal has been this day transmitted to the Clerk of the Circuit Court of the State of Wisconsin at Madison, Wisconsin, and will be filed in said Court on the 18th or 19th day of July, A. D., 1918, by said Clerk when said motion shall have reached him, and that said motion will be presented to said Court in due course.

You are further notified that said defendants and appellants will file their brief upon said motion within the time prescribed by law.

Yours, etc.,

THOMPSON, MYERS & KEARNEY,
Attorneys for Defendants La Salle Street Trust & Savings Bank and William C. Niblack, as Receiver of said La Salle Street Trust & Savings Bank.

Dated Racine, Wisconsin, July 18, 1918.

To Simmons & Walker, Attorneys, and William E. Black, of Counsel, for plaintiffs and respondents above named.

(Indorsements:) No. 65. State of Wisconsin, in Supreme Court. Wisconsin Trust Company v. Walter, et al. Petition for rehearing and Notice of Filing Motion. Filed Jul. 19, 1918. Arthur A. McLeod, Clerk of Supreme Court, Wis.

Received copy of the within petition and Notice this 18th day of July, 1918.

SIMMONS & WALKER AND
WM. E. BLACK,
Attys. for Respts.

THOMPSON, MYERS & KEARNEY,
Solicitors for Appellants.

987 And afterwards, to-wit, on the 8th day of October, A. D., 1918, the motion for rehearing was denied with Twenty-five Dollars costs and costs of motion.

988 And thereafter, to-wit, on November 6, 1918, the following dissenting opinion by Mr. Justice Vinje was filed.

989 STATE OF WISCONSIN:

In Supreme Court.

No. 65.

WISCONSIN TRUST COMPANY et al., Plaintiffs and Respondents,

v.

C. B. MUNDAY et al., Defendants and Appellants.

C. B. MUNDAY et al., Plaintiffs and Appellants,

v.

HORACE E. WALTER et al., Defendants and Respondents.

Consolidated Action.

VINJE, *J.*, dissenting:

I am unable to concur in the view that the amendment to sec. 1770*j* of the statutes made by ch. 211 of the Laws of 1917 did not operate to validate the deeds to the Realty Realization Company which had theretofore complied with sec. 1770*b*. Briefly stated my reasons are these: The case of Hanna v. Kelsey Realty Company 145 Wis. 276, holding that a deed to a foreign corporation that had not complied with sec. 1770*b* of our statutes was void, was decided Feb. 21, 1911. No doubt many titles were affected by that decision. To grant relief ch. 142 of the Laws of 1911 enacted sec. 1770*j* which took effect May 13, 1911. That section provided that any corporation which had before the passage of the act complied with sec. 1770*b* was relieved from any disability in the previous acquisition of real property in this state, and that a person claiming that the title of any corporation was void because of a failure to comply with sec. 1770*b* and the amendment of 1911 might within
990 a year from May 13, 1911, begin an action or set up a defense to declare the title void. If such action or defense was not begun or set up before May 13, 1912, the right thereto expired. In the case of Lanz-Owen Co. v. Garage Equitable Mfg. Co. 151 Wis. 555, this court construed the act as a statute of limitations within which actions could be begun or defenses interposed to declare the title of noncomplying corporations void, and held that at the end of the year in the absence of any action or defense the title became absolute. Notwithstanding this decision which was handed down January 7, 1913, the legislature that year amended sec. 1770*j* by the enactment of ch. 212 which after the title and enacting clause read: "Section 1.—Section 1770*j* of the statutes is amended to read: Section 1770*j*: 1. Any corporation organized otherwise than under the laws of this state, having acquired or attempted to acquire, legal title, or lease to any real property in this state before complying with

the terms of section 1770*b* of the statutes * * * and which has thereafter and before the passage of this * * * section, complied with said section shall be and hereby is relieved from any disability," etc. If, as the court construes it, the words "this section" mean sec. 1770*j* of the statutes and not section 1 of the amendatory act in which they are found, then the amendment of 1913 was entirely nugatory. All titles depending upon conditions existing prior to May 13, 1911, had been fully cured by the act of 1911 as construed in the Lanz-Owen case. The same nugatory result except as to non-profit sharing corporations, is true of the amendment of 1917, ch. 211, which is in the same form as that of 1913. It is true that the law of 1911 says "this act" and that of 1913 "this section."

991 But the natural construction is to refer the words to the section in which they are found in the amendatory act, namely, sec. 1, and not to the original section passed years prior thereto—especially when the latter construction nullifies the whole act. That they are intended to relate to the amendatory act and not to sec. 1770*j* is made evident by an inspection of the original bill submitted in 1913 which had the words, "this amendatory act" instead of the words "this section." The change was made in the redraft prepared by the drafting department of the legislative reference library to conform to the then and present custom of enacting general laws in terms of sections and not of acts, so that they shall fit into the statutes without further changes. The Wisconsin Legislative Directory and Manual of 1913 required all general bills amending sections of the statutes to be in this form: "Section —. Section — of the statutes (of 1898) is amended to read: Section — "Rule 46, Subd. 3 page 117. It will be observed that each bill has its own section numbers, and hence when there is found in a certain section thereof the expression, "before the passage of this section" it must refer to the passage of the section of the bill in which it is found and not to the passage of the section amended. At any rate the function of the library redraft was to make changes of form, not of substance, and it is but fair to presume that such was the intention in substituting the words "this section" for the words "this amendatory act." There is nothing in the language used to indicate the contrary. To charge the legislature with intent to cure conditions existing prior to the enactment of 1913 and 1917 when those conditions were fully cured by the act of 1911

992 itself, except as to non-profit sharing corporations, is to charge it with performing a mere idle ceremony in 1913, and to ignore the fact that the words "before the passage of this section" in the act of 1917, mean the same as they meant in the act of 1913, and refer to the section of the bill in which they are found and not to the section of the statute amended. We all agree it was intended by the act of 1911 to permit corporations theretofore complying with sec. 1770*b* to be relieved from its penalty. Why not give its subsequent acts the same intendment and make them accomplish something? That the period of relief from disability was in each case extended to the time of the passage of the amendment accords with a sane legislative intent and results in effective legislation. To construe the amendments otherwise is to assume repeated legislative attempts since

1911 to accomplish that which was substantially accomplished in 1911.

KERWIN and ESCHWEILER, *JJ.*, dissenting:

Upon the motion made for a rehearing in this case we are now constrained to dissent from the construction given by the majority opinion construing the amendment of 1917. And we concur with the view on that subject of Justice Vinje in his dissenting opinion.

993 And thereafter, to-wit, on the 16th day of November, A. D., 1918, the opinion of the Court by Justice Rosenberry was filed in words and figures following, that is to say:

994 STATE OF WISCONSIN:

In Supreme Court.

No. 65, January Calendar, 1918.

WISCONSIN TRUST COMPANY et al., Respondents,

vs.

MUNDAY et al., Appellants.

MUNDAY et al., Appellants,

vs.

WALTER et al., Respondents.

Consolidated Action.

On Motion for Rehearing.

ROSENBERRY, *J.*:

We have considered the matters urged upon our attention in the briefs of counsel for appellants in support of the motion for rehearing. While some verbal inaccuracies are disclosed by the hypercritical analysis to which the opinion has been subjected, still, when the opinion is read in connection with the facts and circumstances of the case, these largely if not entirely disappear. It was not supposed by the court that the question involved was whether the legislature intended by the enactment of subsec. 1 of ch. 211 of the laws of 1917 to confirm and validate the titles theretofore attempted to be acquired by all foreign corporations which had not complied with sec. 1770*b*. It is perfectly clear that enactments in question have no application to the acts of those foreign corporations which do not comply or have been excused from complying with sec. 1770*b*, and that fact is assumed without repetition throughout the opinion.

995 In the opinion it is said: "If the legislature had intended by the re-enactment of subsec. 1 of sec. 1770*j* to confirm and validate the title thretofore attempted to be acquired by all foreign corporations which had not complied with sec. 1770*b*," etc. In the interest of clearness of expression there should be inserted after the words "sec. 1770*b*" the words "at the time of attempting to acquire such title, and which had thereafter complied with sec. 1770*b*."

It is not accurate to say that a foreign corporation which has been excused from complying with sec. 1770*b* has in effect complied therewith, as is argued in the opinion. But, nevertheless, after re-examination, we are clearly of the opinion that the legislature did not, by the re-enactment in ch. 211 of the laws of 1917 of secs. 1770*b* and 1770*j* intend to do anything except to exempt corporations not organized or conducted for profit from the provisions of sec. 1770*b* and to confirm the title attempted to be acquired by such corporations prior to the enactment of said chapter.

By the Court: Motion for rehearing denied.

996 (Indorsements:) No. 65, January Calendar, 1918. Wisconsin Trust Company et al., Respondents, vs. Munday et al., Appellants. Munday et al., Appellants, vs. Walter et al., Respondents. On Motion for Rehearing. Rosenberry, J. Filed Nov. 16, 1918. Arthur A. McLeod, Clerk of Supreme Court, Wis.

997 STATE OF WISCONSIN:

C. B. MUNDAY, Trustee, et al., Plaintiffs in Error,

vs.

WISCONSIN TRUST COMPANY et al., Defendants in Error.

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above entitled cause.

That the original writ of error, the petition therefor and order allowing the same, the citation with its service endorsed thereon, the assignment of errors, certificate of lodgement and a copy of the bond are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Madison, this 29th day of January, A. D. 1919.

[Seal Supreme Court of Wisconsin.]

ARTHUR A. McLEOD,
Clerk of Supreme Court of Wisconsin.

998 Supreme Court of the United States, October Term 1918.

No. 841.

C. B. MUNDAY, Trustee, et al.
vs.
WISCONSIN TRUST COMPANY et al.

Stipulation.

It is hereby stipulated by and between Walter Bachrach, Counsel for Plaintiffs in Error, and John B. Simmons, M. E. Walker and William E. Black, Counsel for Defendants in Error, that in order to save expense in the printing of the record herein, the following portions of the record, the same being sufficient to show the errors complained of, shall be printed and no more, to-wit:

	Record page.
Writ of Error and Clerk's return thereon	1*a*-3*a*
Petition for Writ of Error	4-8*a*
Order allowing Writ of Error	9*a*-11*a*
Citation and Acceptance of Service	12,13*a*
Assignment of Errors	16-21*a*
Certificate of Lodgment	22-24*a*
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It is further stipulated and agreed that if from oversight or omission any necessary part of the record be not thus printed that the Plaintiffs in Error have the right to print, or may be required by Defendants in Error to print, any further or additional portions thereof.

Dated February 26, 1919.

WALTER BACHRACH,
Counsel for Plaintiffs in Error.
JOHN B. SIMMONS,
M. E. WALKER,
WM. E. BLACK,
Counsel for Defendants in Error.

1000 [Endorsed:] 841—26927. Supreme Court of the United States, October Term, 1918. No. 841. C. B. Munday, Trustee, et al. vs. Wisconsin Trust Company, et al. Stipulation.

1001 [Endorsed:] File No. 26,927. Supreme Court U. S., October Term, 1918. Term No. 841. C. B. Munday, Trustee, etc., et al., Plff. in Error, vs. Wisconsin Trust Company et al. Stipulation as to parts of record to be printed. Filed Feb. 28, 1919.

Endorsed on cover: File No. 26,927. Wisconsin Supreme Court. Term No. 288. C. B. Munday, trustee; La Salle Street Trust & Savings Bank, and William C. Niblack, as receiver of said La Salle Street Trust & Savings Bank, plaintiffs in error, vs. Wisconsin Trust Company and Frederick Robinson. Filed February 8th, 1919. File No. 26,927.

FILED
FEB 13 1920
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1919.

No. 288

C. B. MUNDAY, Trustee; LA SALLE STREET TRUST AND SAVINGS BANK, and WILLIAM C. NIBLACK, as Receiver of said La Salle Street Trust and Savings Bank,
Plaintiffs in Error,

vs.

WISCONSIN TRUST COMPANY and FREDERICK ROBINSON,
Defendants in Error.

BRIEF IN BEHALF OF PLAINTIFFS IN ERROR.

WALTER BACHRACH,
HAMILTON MOSES,
THOMAS M. KEARNEY,
Counsel for Plaintiffs in Error.

Geo. Hornstein Co., Printer, Chicago.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1919.

No. 288

C. B. MUNDAY, Trustee; LA SALLE STREET TRUST AND SAVINGS BANK, and WILLIAM C. NIBLACK, as Receiver of said La Salle Street Trust and Savings Bank,
Plaintiffs in Error,

vs.

WISCONSIN TRUST COMPANY and FREDERICK ROBINSON,
Defendants in Error.

BRIEF IN BEHALF OF PLAINTIFFS IN ERROR.

BRIEF.

I.

Nature of Case.

This is a writ of error, brought by plaintiffs in error, C. B. Munday, Trustee, La Salle Street Trust & Savings Bank and William C. Niblack, as receiver of said bank, to review a judgment of the Supreme Court of Wisconsin, entered on appeal from a judgment of the Circuit Court of Racine County, in two actions tried as one by stipulation.

Action No. 1 was instituted by the Wisconsin Trust Company[1] and Frederick Robinson, defendants in error, to cancel, rescind and set aside,

(1) Two separate deeds given by each, the Trust Company and Robinson to the Realty Realization Company,[2] a Maine corporation, all dated and delivered in Illinois, February 28, 1913, pursuant to a contract made in Illinois between said parties;

(2) A deed given by said Realty Company to the defendant Horace E. Walter, dated March 5, 1913;

(3) A trust deed or mortgage dated March 5, 1913, given by Walter to C. B. Munday, trustee, to secure Walter's note for $50,000, upon the security of which there was loaned by the defendant, the La Salle Street Trust & Savings Bank,[3] the sum of $40,000,

and to revest the title of the premises described in all the foregoing instruments, in the plaintiffs, the Trust Company and Robinson, free of all claims thereunder.

Action No. 2 was instituted December 24, 1913, by plaintiffs, Munday, as trustee, and the La Salle Bank to foreclose said trust deed as a mortgage upon said premises, pledged to secure said loan of $40,000 by said bank to Clinton S. Woolfolk, the president of the Realty Company, evidenced by the note of Horace E. Walter, dated March 6, 1913, for $50,000.

The premises described in all of said instruments are a lot and a five story brick office and store building thereon, located in the City of Racine, Wisconsin, and worth between $60,000 and $75,000.

Hereinafter referred to as:
1. The Trust Company.
2. The Realty Company.
3. The La Salle Bank.

The grounds of the complaint of Action No. 1 and of the defense in Action No. 2 were that the Realty Company, a Maine corporation, had not, prior to the making of the said contract and said deeds, caused to be filed in the office of the Secretary of State of Wisconsin, a copy of its charter or otherwise complied with the requirements of paragraph 2 of section 1770b of the Wisconsin statutes of 1911, and therefore the contract between the Trust Company and Robinson and the Realty Company and the deeds given in pursuance thereof, were wholly void under sub-section 10 of said section 1770b, and that the subsequent conveyance to Walter and the trust deed or mortgage given by Walter to Munday, as trustee, upon the security of which the La Salle Bank lent $40,000, were likewise void.

The Circuit Court of Racine County sustained these contentions of the Trust Company and Robinson, granted the relief prayed for by them in Action No. 1 and dismissed on the merits the complaint for foreclosure in Action No. 2, and entered judgment accordingly.

Munday, trustee, the La Salle Bank and William C. Niblack, as receiver thereof, appealed to the Supreme Court of Wisconsin, which, with three justices dissenting, modified the judgment of the Circuit Court of Racine County as to matters not material of the questions here involved, and affirmed said judgment as so modified. The opinions of the majority and minority justices will be found on pages 33 to 46 and 53 to 55 of the record.

Plaintiffs in error, Munday, Trustee, the La Salle Bank and William C. Niblack, as receiver thereof,

insisted in the Supreme Court of Wisconsin that section 1770b of the Wisconsin statutes is unconstitutional and void, in that it violates the provisions of the Federal Constitution, and that by holding section 1770b of the Wisconsin statutes, as amended, valid, the trial court infringed the rights of said plaintiffs in error under the Contract clause of Section 10, Article 1, and the Due Process clause of the 14th amendment of said Constitution. (Rec., 43, 44.)

Said plaintiffs in error also insisted in the Supreme Court of Wisconsin that the judgment of the Circuit Court of Racine County in failing to give force and efficacy to Section 1770j of the Wisconsin statutes, as amended by chapter 212 of the laws of Wisconsin of 1917 (a curative act), infringed their rights, privileges and immunities under the 14th amendment of the Federal Constitution. (Rec., 43.)

The Supreme Court of Wisconsin decided all of said rights claimed by plaintiffs in error under the Federal Constitution against them. (Rec., 44.)

It is assigned as error in this Court that section 1770b, and more particularly sub-section 10 thereof, of the Wisconsin statutes of 1911, as construed and administered by the highest court of that state, are in violation of Section 10 of Article 1 and of the 14th amendment of the Constitution of the United States; that the failure of the court to give effect to certain prior decisions of the Supreme Court of Wisconsin, affecting said statutes, under which statutes as construed, rights had become vested in plaintiffs in error, and in ignoring the curative statutes, viz., Section 1770j of the Wisconsin statutes, as amended May 11, 1917, was likewise in violation of

the 14th amendment; and also that the judgment of the Supreme Court of Wisconsin, declaring void the contract and deeds in question (which were made outside of the State of Wisconsin), because of the aforesaid statutes of the State of Wisconsin, rendered said statutes unconstitutional and resulted in the taking of plaintiffs in error's property without due process of law, contrary to said amendment. (Rec., 3, 4 and 5.)

All the facts are contained in the findings of the Circuit Court of Racine County and in the opinion of the Supreme Court of Wisconsin.

II.

Statement of Facts.

The Wisconsin Trust Company is a Wisconsin corporation having its principal office and place of business at Milwaukee. (Rec., 16.) On and prior to February 27, 1913, it was the holder, as trustee, of the legal title and Frederick Robinson was the owner of the equitable title to the real estate in controversy, situate in Racine, Wisconsin. The trust deed upon which the Trust Company held said legal title was of such a nature that Robinson had the absolute right to control the sale and direct the conveyance of said property. (Rec., 16.)

The Realty Realization Company was a corporation organized under the laws of Maine and its principal business was dealing in real estate. Its principal office was at Chicago, Illinois. Prior to the commencement of Actions No. 1 and 2 it had not complied with the laws of Wisconsin relating to foreign corporations and had not been licensed under

the laws of Wisconsin to transact business or acquire, hold or transfer property in that state. (Rec., 16.)

On or about February 28, 1913, a contract for the sale by Robinson to the Realty Company of the property in controversy was executed by said parties, the same having been signed by Robinson at Racine,* Wisconsin, and mailed by him to his agent, M. Paul Noyes in Chicago, Illinois, where on said February 28, 1913, it was executed by the officers of said corporation. (Rec., 17.) By such contract Robinson agreed to procure from the Trust Company the conveyance of said real estate to the Realty Company in fee simple by a good and sufficient special warranty deed, and to give a deed to said real estate to be executed by himself and his wife confirming the conveyance by the Trust Company. (Rec., 42.)

A special warranty deed was also executed by the Trust Company and Robinson and his wife, bearing date February 27, 1913, and delivered at Chicago, Illinois, by Noyes, the agent of Robinson, conveying said real estate to the Realty Company, its successors and assigns, in fee simple. (Rec., 17, 42.)

The transaction between Robinson and the Realty Company contemplated that the real estate should be used by the Realty Company for trading purposes. (Rec., 17, 42.)

On March 5, 1913, the Realty Company executed a deed to said property to Horace E. Walter, a clerk in its employ, and on the same date Walter gave to

* Clinton S. Woolfolk, president of the Realty Company, was joined as a third party.

C. B. Munday (who was vice-president of the La Salle Bank) as Trustee, a trust deed or mortgage upon said property to secure Walter's note for $50,000, upon the security of which the La Salle Bank, on March 8, 1913, lent $40,000 to Clinton S. Woolfolk, president of the Realty Company. (Rec., 18, 19.)

At the time of the execution and delivery of the contract and deeds in question, there were in force in Wisconsin the following applicable statutes:

> "Sec. 1770b—2. No corporation, incorporated or organized otherwise than under the laws of this state, except railroad corporations, corporations or associations created solely for religious or charitable purposes, insurance companies and fraternal or beneficiary corporations, societies, orders and associations furnishing life or casualty insurance or indemnity upon the mutual or assessment plan, shall transact business or acquire, hold, or dispose of property in this state until such corporation shall have caused to be filed in the office of the Secretary of State a copy of its charter, articles of association or incorporation and all amendments thereto duly certified by the Secretary of State of the state wherein the corporation was organized."
>
> (P. 1223, Wis. Stats., 1911.)
>
> • • • • • • •
>
> "10. Every contract made by or on behalf of any such foreign corporation, affecting the personal liability thereof or relating to property within this state, before it shall have complied with the provisions of this section, shall be wholly void on its behalf and on behalf of its as-

signs, but shall be enforceable against it or them." *

(P. 1225, Wis. Stats., 1911.)

At the time of the execution of the deeds in question the sections of the Foreign Corporation Act originally adopted, had undergone an amendment by the passage of an act creating the new Section 1770j of the statutes. This Act as passed was as follows:

"CHAPTER 142.

"AN ACT to create Section 1770j of the statutes, relating to titles to real property acquired by foreign corporations before being admitted to do business pursuant to Section 1770b of the statutes.

"The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

"**Section 1.** There is added to the statutes a new section to read: Section 1770j. 1. Any corporation organized otherwise than under the laws of this State, having acquired, or attempted to acquire, legal title by deed, or lease to any real property in this State, before complying with the terms of Section 1770b of the statutes, or acts amendatory thereof, and which has thereafter, and before the passage of this act, complied with said section, shall be and is hereby relieved from any *disability* provided in said statute or prohibition therein contained, so far as said section relates to the acquisition and holding of the property so acquired, or attempted to be acquired.

"2. Any person claiming that the legal title of any corporation or of any person claiming

* The unconstitutionality of these provisions was asserted upon grounds not involved here, and denied by this Court in 1903 in

Diamond Glue Co. v. *United States Glue Co.*, 187 U. S., 611.

by, through, or under such corporation, to any real property acquired, or attempted to be acquired, is invalid by reason of the failure of any corporation coming within the terms of Subsection 1 of this act, to comply with Section 1770b of the statutes or acts amendatory thereof, shall commence action to recover the property, or to declare the legal title of said corporation void, or interpose a defense on such grounds, within one year from the passage and publication of this act, *and in case of failure to do so his right of action or defense, based upon the failure to comply with said section by any such corporation, shall be deemed to have expired;* provided that this act shall not affect any action now pending.

"Section 2. This act shall take effect and be in force from and after its passage and publication.

"Approved May 12, 1911.

"Laws of Wisconsin, 1911, p. 139."

Prior to the decision in the case at bar by the Supreme Court of Wisconsin the aforesaid statutory provisions were construed by that court in the case of *Lanz-Owen Co.* v. *Garage Equipment Co.*, 151 Wis., 555; 139 N. W., 393, and *Mortenson* v. *Murphy*, 153 Wis., 389; 141 N. W., 273. The *Lanz-Owen* case was decided January 7, 1913, and the *Mortensen* case, April 29, 1913.

The plaintiffs in error contended in the Supreme Court of Wisconsin that under the above statutes and said decisions of that court construing said statutes, which statutes and decisions were part and parcel of said contract and deeds, the failure on the part of the Realty Company to file its charter, etc., rendered such contract between Robinson and

the Realty Company and the deeds from the Trust Company and Robinson to the Realty Company, merely *voidable* and not void (Rec., 34), and that since the transactions contemplated that the property in question was to be used by the Realty Company for trading purposes, the Trust Company and Robinson were estopped in equity from declaring them to be void. (Rec., 34, 35.)

Plaintiffs in error also argued, in the Supreme Court of Wisconsin, from the same premise, that since the contract between Robinson and the Realty Company required Robinson to procure from the Trust Company a special warranty deed conveying title in fee simple, and to give, together with his wife, a confirmatory deed, and since the deeds executed and delivered in pursuance of such contract contained special covenants of warranty under which the grantors undertook to forever warrant and defend the Realty Company, its successors and assigns, in its quiet and peaceable possession, and conveyed title in fee simple, the Trust Company and Robinson were estopped also for such reasons from asserting that the Realty Company acquired no title by virtue of and under said deeds. (Rec., 34, 42.)

The Supreme Court of Wisconsin, as well as the Circuit Court of Racine County, however, denied plaintiffs in error's premise and held that under section 1770b of the Wisconsin statutes of 1911 (and more particularly sub-section 10 thereof) the contract and deeds given were *void*, and not merely voidable, and *for that reason* held that the Trust Company and Robinson were not estopped as contended by the plaintiffs in error. (Rec., 42, 43.)

On March 5, 1915, while Actions No. 1 and 2 were pending in the Circuit Court of Racine County, the Realty Company had complied with said Section 1770b and had been licensed by the Secretary of State of Wisconsin to do business, and to acquire, hold or dispose of real property, in that state. (Rec., 28.)

On May 11, 1917, there became effective in Wisconsin the following curative statute known as Chapter 212 of the Laws of 1917, which is as follows:

> "AN ACT to amend subsection 2 of section 1770b and subsection 1 of section 1770j of the statutes, relating to the filing of articles of incorporation by foreign corporations.
>
> "The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:
>
> "*Section* 1. Subsection 2 of Section 1770b and *subsection* 1 of section 1770j of the statutes are amended to read: (Section 1770b) 2. * * *
>
> "(Section 1770j) 1. Any corporation organized otherwise than under the laws of this state, having acquired, or attempted to acquire, legal title by deed, or lease to any real property in this state, before complying with the terms of section 1770b of the statutes, and which is now not required to comply with said section or which has thereafter, and before the passage of this section, complied with said section, shall be and is hereby relieved from any disability provided in said statute or prohibition therein contained, so far as said section relates to the acquisition and holding of the property so acquired, or attempted to be acquired, and the title so acquired, or attempted to be acquired, **is hereby confirmed.**
>
> "Section 2. This act shall take effect upon passage and publication."

A majority of the justices of the Supreme Court of Wisconsin held that the title of the Realty Com-

pany was not confirmed or validated by said act. (Rec., 41.) Three of the justices of that court, however, dissenting, held the contrary. (Rec., 53.)

The judgment of the Supreme Court of Wisconsin modified the judgment of the Circuit Court of Racine County, as to a matter not involved here and affirmed the judgment as so modified. (Rec., 46.)

III.

Errors Relied On.

The plaintiffs in error allege error in the judgment here under review as follows:

1. The error in holding that Section 1770b and more particularly subsection 10 thereof, of the Wisconsin Statutes of 1911, *as administered and enforced by the Supreme Court of Wisconsin,* is valid and does not violate Section 10 of Article I of the Constitution of the U. S. providing that "no State shall pass any law impairing the obligation of contracts" or the Fourteenth Amendment of said Constitution, providing "nor shall any State deprive any person of * * * property without due process of law."

2. Error in *so administering* and *enforcing* subsection 10 of Section 1770b of said Wisconsin statutes against plaintiffs in error as to render absolutely void the deeds from the Trust Company and Robinson and wife to the Realty Company, whereas under said statute, both as written and as previously construed by the Supreme Court of Wisconsin (which statute and decisions were part of said contract and deeds), such deeds were merely voidable.

3. Error in holding that Section 1770b, and more particularly Sub-section 10 thereof, of said Wisconsin Statutes, *as administered and enforced* by the Supreme Court of Wisconsin, so as to render void the contract and deeds made outside the State of Wisconsin, is valid and does not violate the Fourteenth Amendment of said Constitution, providing, "nor shall any state deprive any person of * * * property without due process of law."

4. Error in depriving plaintiffs in error of their property without due process of law, in violation of the Fourteenth Amendment, in this that the Supreme Court of Wisconsin in administering said Section 1770b and more particularly subsection 10 thereof, refused to give any effect to Section 1770j of the Wisconsin Laws of 1917, which became part of the contract and deeds in controversy and a rule of property, and in administering and enforcing against plaintiffs in error said Section 1770b and more particularly subsection 10 thereof, in violation of Section 10 of Article I of the Constitution of the United States providing that "no State shall pass any law impairing the obligation of contracts."

5. Error in depriving plaintiffs in error of their property without due process of law in violation of the Fourteenth Amendment by refusing to give efficacy to the curative act of 1917, which validated the deeds and confirmed in the Realty Company the title thereby conveyed.

IV.

Argument.

I.

Under Section 1770b, and more particularly Sub-section 10 thereof, both as written and construed by the Supreme Court of Wisconsin prior to the making of the contract and the execution and delivery of the deeds in controversy, such deeds were merely voidable and not void. Such statute as now administered and enforced against plaintiffs in error by the Supreme Court of Wisconsin, so as to render such deeds absolutely void, impairs the obligation of such contract and deeds and deprives plaintiffs in error of their property without due process of law.

It was contended by plaintiffs in error in the Supreme Court of Wisconsin that defendants in error were estopped from asserting that the deeds in question were void, by matters *in pais*, namely, by reason of the fact that they conveyed the property in the first instance to the Realty Company for trading purposes, and by the special covenants of warranty contained in the deeds.

These contentions were disposed of by that court adversely to plaintiffs in error, upon the sole ground that the deeds were absolutely void.

This court will therefore see that the question as to whether the deeds were voidable or void, was a pivotal point in the case. If the deeds were voidable merely the contentions of plaintiffs in error based upon such matters of estoppel would have had to be sustained.

From a bare reading of sub-section 10 of Section 1770b, it will be observed that the contract there referred to, is thereby made voidable merely and not

void. While said section declares the contract to be void, yet the word "void" is used in the sense of "voidable," since the contract is made *enforceable* against the offending corporation.

If a contract is enforceable by one party against the offending corporation—that is, valid as to one party—and void as to the other, of necessity the word "void" means "voidable." "Void" in a strict sense means void as to all parties, something not enforceable by *either* of the contracting parties, whereas "voidable" expresses the idea that while the contract is valid as to one of the parties and may be enforced by him against the other, it may be *avoided* and rendered unenforceable as to the other party, for some reason recognized in the law as depriving him of the right to enforce it.

As the statute under consideration provides that every contract of any offending corporation, shall be *wholly void on behalf of such corporation* and its assigns, but shall be *enforceable* against it, the statute, therefore, plainly means that, inasmuch as the contract is *enforceable* in *favor* of *one* of the parties, against the offending corporation, it is merely voidable. Any other meaning given to said statute would result in a legal anomaly. This is clearly shown by the curative act of May, 1911, by which the Legislature materially reduced the period of time within which a party contracting with an offending corporation (which had later complied) might institute proceedings to *avoid* contracts with such corporations, and the failure of such corporations to comply with Section 1770b was treated and

named as a *mere disability* by the very *terms* of the statute *itself*.

According to the above statutes, as written, a contract by a non-complying foreign corporation is voidable—that is, may be avoided by the other party—and not void in the strict sense.

The Supreme Court of Wisconsin in the case of *Lanz-Owen Company* v. *Garage Equipment Co.*, 151 Wis., 555, decided before the execution of the contract and deeds in question, held that a party dealing with an offending corporation had the right to "*affirm*" or "*disaffirm,*" at his *election*, a contract with such corporation, but that the contract was *not* absolutely void. In that case there was a controversy over possession of premises held under a lease. The plaintiff was a foreign corporation *not* complying with Section 1770b. The case arose after the passage of the curative act of 1911, the corporation having, *after* acquiring the lease, complied with Section 1770b before the passage of the Act of 1911. It was contended that the Act of 1911 *validated* the title of the non-complying corporation, thereafter complying. The Supreme Court of Wisconsin held that the correctness of this contention would have to be tested by the language and purpose of the Act of 1911, read in connection with Section 1770b.

That court, speaking through Judge Vinje, says:

> "**Reference to the decided cases affected by this section shows that the contract entered into is not absolutely void.** *Ashland L. Co.* v. *Detroit S. Co.*, 114 Wis., 66; *Beaser* v. *Barber A. P. Co.*, 120 Wis., 599; *Allen* v. *Milwaukee*, 128 Wis., 678; *Duluth M. Co.* v. *Clancy*, 139 Wis., 189; *Rib Falls L. Co.* v. *Lesh & M. L. Co.*, 144 Wis., 362;

Hanna v. *Kelsey R. Co.*, 145 Wis., 276. In the first case cited, the proper limitation is found on page 78 of the opinion by declaring it a nullity in so far as it is sought to be enforced on behalf of the foreign corporation by way of counterclaim. In the last case cited, language declaring it void without limitation is used, *but the court was dealing with a case in which a foreign corporation sought to assert the validity of its deed, and it was held that plaintiff, though not a party to but affected by it, could invoke the aid of the statute. The decision upon this branch went no further.* The contract is void only **at the election of the party dealing with the corporation.** Neither the corporation nor its assigns could enforce it against the other party. **But such party may affirm or disaffirm the contract at his election.** * * *

"It (the Act) makes no contract for the parties, nor does it allow the corporation to insist upon the validity of contracts already made, *unless the other party fails to disaffirm or set up a defense to the contract within the year.* In other words, it leaves the contract made just as it was, except that it provides that the right of the party dealing with a corporation, that is within the amendment, to disaffirm the contract must be exercised within the year, otherwise it shall be deemed to be binding upon him.

"A party dealing with a foreign corporation that had not complied with Sec. 1770b did not agree to become bound *absolutely.* He entered into such contract **with the right reserved to enforce or disaffirm it at his election.** The amendment has not cut off **such right of election,** but has merely prescribed a reasonable period within which it must be exercised. The power of the Legislature to prescribe a reasonable time within which rights may be enforced is unquestioned. It is also evident that a period of one year is a reasonable time within which to exercise **the right of election to disaffirm.**"

This court will see that, by the foregoing case, the Supreme Court of Wisconsin not only *held*, but asserted its prior holdings to have been—"that the contract entered into is not absolutely void"; that if the other party failed to commence an action within one year "the *right* of *election* to *disaffirm*" was forever *gone*, and the contract *thereafter* "shall be deemed to be *binding* upon him."

That this is the correct construction of the opinion of the Wisconsin Supreme Court and was so regarded by the majority of that court is demonstrated by the language in a concurring opinion of Justice Timlin, who evidently *disagreed* with the conclusion reached in the case to the effect that the party dealing with the offending corporation alone had the *election* of avoiding the contract, and could *affirm* or *disaffirm* the same as he chose. Justice Timlin says:

> "I concur in the decision of the court, but I do not wish to be bound by the following statements contained in the written opinion:
>
> "'The contract is void only at the election of the party dealing with the corporation. Neither the corporation nor its assigns could enforce it against the other party. But such party may affirm or disaffirm the contract at his election.'
>
> "I think these staements are erroneous and contrary to previous decisions, and I fear the words will hereafter be made a basis for the claim on the part of the foreign unlicensed corporations that such contract may be validated by subsequent affirmation or by estoppel, and the statute thus frittered away."

It is of the greatest importance that this Court should bear in mind the fact that in Action No. 1, Robinson and the Trust Company were *plaintiffs;* they, therefore, were the ones who by an affirmative proceeding, attacked and sought to disaffirm the deeds. The assigns of the foreign corporation were *defending.* In such a situation, therefore, the case is like that mentioned by the Supreme Court of Wisconsin in the opinion in the *Lanz-Owen* case, when it says, speaking of the *Ashland Lumber Co.* case:

> "Language declaring it void without limitation is used, *but the court was dealing with a case in which a foreign corporation sought to assert the validity of a deed, and it was held that the plaintiff, though not a party to, but affected by it, could invoke the aid of the statute.* **The decision upon this branch of the case went no further.** * * * "

In other words, the contract was *valid,* unless the *other party elected* to *avoid it.* This, therefore, perforce made the contract one merely voidable.

Mortenson v. *Murphy,* 153 Wis., 389,

was a case involving titles of lands conveyed to a non-complying corporation, which subsequently, and before May, 1911, complied with Section 1770b. Thereafter, the grantor made a *second* conveyance to the mortgagee of the foreign corporation. This deed was held to *validate* the *prior* deed given to the non-complying corporation. Here, again, the case arose under the Act of 1911. A controversy resulted between the assignee of a mortgage and the mortgagee of a foreign corporation, to whom a *second* deed had been executed by the grantor. In holding that the grantor had thus *elected to affirm* the con-

veyance, the Supreme Court of Wisconsin in a unanimous decision, after setting out the Act of 1911, said:

> "This is in the nature of a statute of limitation. It makes it incumbent on the party dealing with the corporation to assert his right by action or defense within one year from the passage of the act. *If he does not do so, he will be barred from thereafter making a claim.* Title was not taken away by the statute. It could be asserted at any time within the period stated. If it was not so asserted, the corporation in effect got title at the expiration of the year by force of the statute. The act allowed the party dealing with the corporation a year **in which to disaffirm his contract.** If he did **not** do so, it in effect became **validated. This is the construction placed on the act in** *Lanz-Owen Co.* v. *Garage Equipment Mfg. Co.*, 151 Wis., 555."

This court will observe that here again the Supreme Court of Wisconsin treated Section 1770b, in the light of the 1911 amendment, as a statute merely creating a *disability* and merely giving the party dealing with the corporation a *right* to *disaffirm* his contract, and held that he might *preclude* himself from such right of *disaffirmance* by giving a *second* conveyance to the successor in title of the offending corporation.

Again in

> *Allen* v. *Fulton*, 167 Wis., 352; 167 N. W., 429,

the Supreme Court of Wisconsin in an action to enforce a contract for the purchase of stock in a non-complying corporation, in which the contract was sought to be enforced by the receiver of such

corporation, again *held* the contract to be *voidable merely,* and *not void,* under Section 1770b.

The opinion recites that it was *contended by the defendant* that the foreign corporation "had not complied with the provisions of Section 1770b, Stats. 1898, and acts amendatory thereof, *and therefore that transactions with the corporation were wholly void.*"

In answering this contention the Wisconsin Supreme Court in a unanimous opinion by Justice Vinje, said:

> "Sub-section 10 (of Section 1770b) takes all transactions affecting the personal liability of the corporation out of the general condemnation of Subdivision 2, and provides that they may be enforced *against,* but *not by,* the corporation. **They are, therefore, not void, but voidable, at the election of the party dealing with the corporation, as was held in the case of** *Lanz-Owen* v. *Garage Equipment Mfg. Co.,* 151 Wis., 555; 139 N. W., 393. Such party may affirm or disaffirm the contract at his election. • • • Defendant must, therefore, be deemed to have *elected* to *affirm* the contract of stock subscription. *Having* so *elected,* his liability as a stockholder attached, and **he can claim no immunity therefrom on the ground that the corporation had not complied with the provisions of Section 1770b at the time he bought his stock.** He could have *disaffirmed* his stock subscription contract, *if seasonably done,* and have *avoided* liability as a stockholder; *but he did not do so.* He *chose* to *affirm* the contract. • • • When, by an *affirmance* of the contract he *elected* to *validate* it, he became a lawful stockholder, and his liabilities as such at once attached. • • •"

Thus it appears that *prior* to the execution of the contract and deeds herein given, and thereafter, up to the rendition of the opinion of the Supreme Court of Wisconsin in the case at bar, that court has consistently declared that the contract of a non-complying foreign corporation, was merely *voidable* and not *void*.

Plaintiff in error, the La Salle Bank, having in good faith lent $40,000 upon the faith of said statutes as construed by the Wisconsin Supreme Court and the security of the real estate and the title therein conveyed by said deeds, had a vested property right in the statute as written and as construed by the Wisconsin Supreme Court prior to the making of said contract and deeds.

The statutes as existing prior to the execution of the contract and deeds and the decision of the Wisconsin Supreme Court in the *Lanz-Owen* case, construing such statutes were part and parcel of said contract and deeds. That court has now given to the said statutes an entirely *new* meaning in like effect as if such statutes were wholly amended.

The statutes and more particularly sub-section 10 of Section 1770b are *now* administered and enforced against plaintiffs in error by the judgment of the Supreme Court of Wisconsin, so as to impair the obligation of said contract and deeds and to deprive plaintiffs in error of their property without due process of law.

This court has held that even though a law of the state, as written, is not attacked, yet a Federal question is presented when such law *as administered* and *justified* by the highest court of the state,

is attacked and asserted to be a violation of the Constitution of the United States.

Myles Salt Co. v. *Iberia Drainage Dist.*, 239 U. S., 478.

Mackay Telegraph Co. v. *Little Rock*, 250 U. S., 94, 98.

Kaukauna Company v. *Green Bay, etc., Canal*, 142 U. S., 269.

We fully recognize the right of the courts of Wisconsin to declare rules of property, or change or modify their decisions, but we submit that such power cannot be exercised by the Supreme Court of Wisconsin to take away the rights of plaintiffs in error, which have been acquired by contract and have come under the protection of the Constitution of the United States.

There can be no doubt but that the statutes of Wisconsin, as *administered* in the case at bar against the plaintiffs in error, do impair the obligations of the contract and deeds in question. If the contract and deeds in question were voidable merely, as the Wisconsin statutes as written and as construed by decisions of Supreme Court of Wisconsin prior to the execution of such contract and deeds, declare they are, then the statutes *as now administered* by the Supreme Court of Wisconsin rendering such contract and deeds absolutely void, violate the Contract clause of the Constitution of the United States and the Due Process clause of the Fourteenth Amendment.

Here the La Salle Bank lent $40,000 in good faith in reliance upon the statute as written and the deci-

sion of the Supreme Court of Wisconsin in the *Lanz-Owen* case, declaring that such contract and deeds were not absolutely void.

The Supreme Court of Wisconsin in the case at bar administered and justified the statutes of Wisconsin, so as to make said contract and deeds absolutely void as against plaintiffs in error, and said statutes *so administered* directly infringe on plaintiffs in error's rights under the Contract clause of said Constitution.

In

Muhlker v. *N. Y. Harlem R. R. Co.*, 197 U. S., 544, 570,

this court said:

> "This is the ground of our decision. We are not called upon to discuss the power or limitation upon the power of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away the rights which have been acquired by contract and have come under the protection of the Constitution of the United States."

In

Sauer v. *New York*, 206 U. S., 536, 549,

this court said:

> "If the facts upon which this claim is based are accurately stated, then the case comes within the authority of Muhlker v. N. Y. Harlem R. R. Co., 197 U. S., 544, which holds that when a court of appeals has once interpreted the contract existing between the land owner and the City, that interpretation becomes a part of the contract upon which the party acquiring the land may rely and that any subsequent change of it to his injury may impair the obligations of the contract."

See also

Ohio Life Ins. Co. v. *Debolt*, 16 Howard, 432.
Gelpcke v. *Dubuque*, 1 Wallace, 206.
Douglass v. *Pike County*, 101 U. S., 687.

II.

Section 1770 B, and more particularly Sub-Section 10 thereof, of the Wisconsin statutes, as administered and enforced in the case at bar, by the Wisconsin Supreme Court, so as to render void the contract and deeds made and delivered in Illinois, violates the Due Process clause of the Fourteenth Amendment of the Constitution of the United States.

It will be remembered that the contract between the defendants in error and the Realty Company, and the deeds delivered in pursuance thereof, were all made in Illinois. The Supreme Court of Wisconsin, by its judgment has so construed and enforced said section of the statutes, as to render such contract and deeds void. Said statute, therefore, as so administered and enforced violates the Due Process clause of said Fourteenth Amendment.

In

Allgeyer v. *Louisiana*, 165 U. S., 591,

this court said:

> "In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the state may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the state as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the

> nature involved in this case outside of the limits and jurisdiction of the state, and which are also to be performed outside of such jurisdiction; nor can the state legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is the subject of the insurance may at the time when such insurance attaches be within the limits of the State. The mere fact that a citizen may be within the limits of a particular state does not prevent his making a contract outside its limits while he himself remains within it. *Miliken* v. *Pratt*, 125 Mass., 374; *Tilden* v. *Blair*, 21 Wall., 241. The contract in this case was thus made. *It was a valid contract, made outside of the state, to be performed outside of the state, although the subject was properly temporarily within the state.*"

In the case at bar the Realty Company was not a Wisconsin corporation and was not doing business in that state. Under the foregoing decision, therefore, the mere fact that the property was there situated, did not justify the State of Wisconsin in passing any law rendering void such contract and deeds, or the Supreme Court of that state in so administering and enforcing said law, as to produce a like effect. Under the decision in the *Allgeyer* case, Section 1770b of the Wisconsin Statutes as administered and enforced by the Supreme Court of Wisconsin, violates the due process clause of the Constitution of the United States.

III.

The judgment of the Supreme Court of Wisconsin in declaring the deeds void and in refusing to give them efficacy, notwithstanding the validating statute of 1917, deprived plaintiffs in error of their property, without due process of law in violation of the 14th Amendment.

If the validating statute of 1917 had the effect of legalizing the deeds from the Wisconsin Trust Company and Robinson to the Realty Company (as we shall hereafter demonstrate to be the case), and if such statute had the effect of confirming the title of the Realty Company (as the Supreme Court of Wisconsin indicated the validating act did, under the facts appearing in *Bennington County Savings Bank* v. *Lowry,* 160 Wis., 659), then the failure of that court to give force and efficacy to the amendment, and its action in rendering a judgment, declaring the deeds absolutely void and establishing title in defendants in error, in legal effect deprived plaintiffs in error of their property, without due process of law, in violation of the 14th amendment.

The Supreme Court of Wisconsin in *Bennington County Savings Bank* v. *Lowry,* referring to the curative Act of 1911, held that

> "the mortgage having been validated by the Act of 1911, it became in all respects as good and valid a contract between the parties thereto as if no impediment to its validity had existed when it was made."

In other words, the effect of the passage of the validating act was to make deeds at bar valid *ab initio* and with like effect as though the Realty Com-

pany had *originally*, and *prior* to the conveyances to it, *complied* with the Foreign Corporation statute.

This being so, the deeds were valid contracts and enforceable as such, conferring rights upon plaintiffs in error and conveying the fee simple title to the premises to their grantor, the Realty Company.

The deeds thus being contracts, valid and enforceable, were, as was also the title thereby conveyed, therefore, within the protection of the Due Process clause of the 14th Amendment of the Federal Constitution.

In *Bennington County Savings Bank* v. *Lowry, supra,* the Supreme Court of Wisconsin held the rights given by a similar validating statute to be within the protection of the Federal Constitution and used the following language, immediately succeeding that above quoted:

> "The natural result of this is that from the time of its validation, it was within the protection of the provisions of Section 12, Art. I of the State Constitution, and Section 10, Art. I of the Federal Constitution, forbidding the passage of any laws impairing the obligations of contracts."

In answering the contention that the Legislature had, by a later act, repealed the validating statute, that court, in the same case said, further:

> "All legislative efforts were evidently directed to legalize the mortgages rendered invalid under the original provisions of the statutes, and manifestly there was no intent to invalidate by the Act of 1913 those legalized in 1911. Further, *if the Legislature had intended such a result, the attempt would have*

failed under the constitutional provisions forbidding the passage of laws impairing the obligation of contracts.''

The judgment of the trial court was reversed, and the mortgage ordered foreclosed.

In that case the question raised was whether the Legislature had, in violation of the Federal Constitution, impaired the contract arising from said validating Act. Here the contention is, that the judgment of the Wisconsin Supreme Court deprived plaintiffs in error of their property without due process of law, by taking from plaintiffs in error the rights granted by the Act of 1917.

In principle, that case is the same as the case at bar, the only difference between the two being, that in the one instance there was invoked the Contract clause of the Federal Constitution and in the other the Due Process clause of the 14th Amendment is invoked.

As the result of the judgment in the case at bar of the Supreme Court of Wisconsin, the property of plaintiffs in error was taken from them by the action of that court in declaring the deeds and the contracts evidenced thereby to be void, and given defendants in error without compensation to plaintiffs in error.

The prohibitions of the 14th Amendment ''refer to all the instrumentalities of the state, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against depriva-

tion by the State, 'violates the constitutional inhibition; and as he acts in the name of the State, and is clothed with the State's powers, his act is that of the State.' "

Chicago, Burlington, etc., R'd v. *Chicago*, 166 U. S., 233, 234.

The mere fact that plaintiffs in error were deprived of their property by the judgment of the Wisconsin Supreme Court, after notice and hearing, does not make such action any the less a deprivation without due process of law. "A State may not, by any of its agencies, disregard the provisions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment.* In determining what is due process of law regard must be had to substance, and not to form."

166 U. S., 234, 235.

If the validating Act of 1917 established property rights in plaintiffs in error (as we shall show is the

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* A common example is the judgment of a court, after due notice and a full hearing, taking private property for public use without just compensation.

In Chicago, Burlington, etc., R'd v. Chicago, this Court said:

"In our opinion, a judgment of a State Court, even if it be authorized by statute, whereby private property is taken for public use, without compensation made or secured to the owner, is upon principle and authority, wanting in due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument." (166 U. S., p. 241.)

fact), then the final judgment of the Supreme Court of Wisconsin, depriving plaintiffs in error of such rights and awarding them to the defendants in error, without compensation, deprived plaintiffs in error of such rights without due process of law.

There is no more reason for prohibiting the taking of private property for public use, without just compensation, *than there is for prohibiting the taking of such property for private ownership without any compensation.*

It remains, therefore, for this court to determine, whether or not, the Legislature of Wisconsin by the passage of the curative statute of 1917, confirmed the title of the Realty Company, its grantee and successors in title, and validated the title theretofore attempted to be conveyed by the Trust Company and Robinson.

In the determination of such question, this court has power to construe the statutes of Wisconsin for the purpose of ascertaining whether there was any contract conferring property rights upon plaintiffs in error, of which they were deprived by the judgment of the Supreme Court of Wisconsin without due process of law.

In the case at bar plaintiffs in error contend that the deeds in controversy were validated and confirmed by the curative Act of 1917. The question, therefore, whether the deeds were such valid contracts as are within the protection of the Federal Constitution, necessarily depends upon the meaning and effect of such curative Act, and in determining whether such deeds did in fact constitute such valid contracts, this court has the power to construe such **Act for itself.**

In

St. Paul Gas Light Co. v. *St. Paul,* 181 U. S., 142, 147,

Mr. Justice White states the rule as follows:

> "Where subsequent State legislation is asserted to be repugnant to the Constitution of the United States because such legislation impairs the obligations of a contract, the power to determine whether there be such impairment imposes also on this court the duty, when necessary, to ascertain whether there was a contract and its import. And this, though it be in a given case, the State court has decided that there was no impairment either because the contract had never existed or because from an interpretation of its provisions it was found that the obligations which it asserted were impaired, never arose. *Houston & Texas Central Rd.* v. *Texas,* 177 U. S., 66, 77, and cases cited. In cases of this nature, therefore, the questions to be considered are these: Was there a contract, and if yes, what obligations arose from it? and, Has there been State legislation impairing the contract obligations? Abstractly speaking, the duty would be first in order to determine whether the contract existed and its true meaning, before ascertaining whether any obligations of the contract had been impaired by subsequent legislation."

This court has held from

Jefferson Branch Bank v. *Skelley,* 1 Black, 436, to

Louisiana Ry. & Nav. Co. v. *New Orleans,* 235 U. S., 164,

that it will construe for itself the meaning of a statute as affecting an alleged contract where it is claimed that a subsequent statute passed by the state has impaired the obligations of such contract.

In such cases this court construes the earlier statute in order to determine the existence, validity or import of the contract alleged to be impaired.

In the case at bar it is not contended by plaintiffs in error that the deeds as validated by the Act of 1917, were impaired by legislation, but that the plaintiffs in error were deprived, without due process of law, of the contract and property rights existing under said deeds as so validated. In order therefore, for this court to determine whether such deprivation took place, it must ascertain for itself whether the deeds constituted valid contracts and this involves the construction and effect of the curative Act of 1917.

In

Jefferson Branch Bank v. *Skelly, supra,*

this court said:

> "As this court has repeatedly said, whenever an occasion has been presented for its expression, that its rule of interpretation has invariably been, that the constructions given by the courts of the states to State legislation and to State Constitutions have been conclusive upon this court, *with a single exception,* and that is when it has been called upon *to interpret the contracts of States,* 'though they have been made in the forms of law,' or by the instrumentality of a State's authorized functionaries, in conformity with State legislation. It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, *whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one,* within the meaning of that clause of the Constitution of the United States

which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular State legislation, if this court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion; and in forming its judgment in such a case, it makes no difference in the obligation of this court in reversing the judgment of the Supreme Court of a State upon such a contract, whether it be one claimed to be such under the form of State legislation, or has been made by a covenant or agreement by the agents of a State, by its authority.

See also:

Mobile & Ohio Railroad v. *Tennessee,* 153 U. S., 121.

Houston, etc., R. Co. v. *Texas,* 177 U. S., 77.

McCullough v. *Virginia,* 172 U. S., 109.

IV.

The Legislature of Wisconsin, by the passage of the Amendatory Act of May 11, 1917, amending inter alia, Subsection 1 of Section 1770j of the Act of May 10, 1913, confirmed the title of the Realty Company, its grantee and successors in title, and absolutely and unconditionally validated the title theretofore attempted to be granted by the Trust Company and Robinson.

The deeds from the Trust Company and Robinson to the Realty Company were executed February 27, 1913, and delivered February 28, 1913.

The deed from the Realty Company to Walter, and the mortgage from Walter to C. B. Munday, trustee, to secure Walter's $50,000 note were both executed and delivered on March 5, 1913, and delivered to the La Salle Bank on March 8, 1913.

On October 5, 1915, the Realty Company complied with the laws of Wisconsin relating to foreign corporations and was duly licensed by the Secretary of State to transact business, and to acquire, hold or dispose of property in said state. (Rec., 28.)

On May 11, 1917, the Legislature passed the curative statute which plaintiffs in error contend validated the deeds in question and confirmed title to said property in the Realty Company the grantor of plaintiffs in error.

In order to arrive at the full significance and effect of the said curative act a brief review of the curative legislation as applied to foreign corporations in Wisconsin is necessary.

Prior to May 12, 1911, the Wisconsin Supreme Court, construing Section 1770b in a line of deci-

sions commencing with *Ashland Lumber Co.* v. *Detroit Salt Co.*, 114 Wis., 66, and ending with *Hanna* v. *Kelsey Realty Co.*, 145 Wis., 176 (decided February 21, 1911), had seemingly held that a contract with, or conveyance to, a foreign corporation failing to comply with Section 1770b was *absolutely void* (not merely voidable), and that the language of subsection 10 of Section 1770b, so declaring, would have to be taken in its literal sense.

Immediately following the decision of *Hanna* v. *Kelsey Realty Co., supra,* decided February 21, 1911, the Legislature adopted a new section, known as Section 1770j, for the obvious purpose of bringing about a change in the state of the law as previously declared by that court in construing Section 1770b, and as last announced in the *Hanna* case, concerning titles to real estate attempted to be acquired by non-complying foreign corporations.

In reproducing this Act, with its title and sections, as well as the later Acts to which reference has been made, we have taken the liberty of indicating thus: **in black-face type**, the words of the respective Acts to which attention is particularly called as sustaining the contention of plaintiffs in error that the amendatory Act of 1917, amending Section 1770j, as adopted in 1911, was intended by the Legislature to validate the title of all such profit-sharing foreign corporations as had, *prior* to the passage of the amendatory Act on May 11, 1917, *complied* with the provisions of Section 1770b. Reference will be made, from time to time in the argument, to the black-face type words indicated in the various Acts in question.

Section 1770j, as adopted on May 12, 1911, is as follows:

CHAPTER 142.

"AN ACT to create Section 1770j of the statutes, relating to titles to real property acquired by foreign corporations before being admitted to do business pursuant to Section 1770b of the statutes.

"The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

"**Section 1.** There is added to the statutes a new section to read: Section 1770j. 1. Any corporation organized, otherwise than under the laws of this State, having acquired, or attempted to acquire, legal title by deed, or lease to any real property in this State, before complying with the terms of Section 1770b of the statutes, or acts amendatory thereof, and which has thereafter, and before the **passage** of **this act**, complied with said section, shall be and is hereby relieved from any disability provided in said statute or prohibition therein contained, so far as said section relates to the acquisition and holding of the property so acquired, or attempted to be acquired.

"2. Any person claiming that the legal title of any corporation or of any person claiming by, through, or under such corporation, to any real property acquired, or attempted to be acquired, is invalid by reason of the failure of any corporation coming within the terms of Subsection 1 of **this act**, to comply with Section 1770b of the statutes or acts amendatory thereof, shall commence action to recover the property, or to declare the legal title of said corporation void, or interpose a defense on such grounds, within one year from the **passage** and publication of **this act**, and in case of failure to do so his right of action or defense, based upon the failure to comply with said section by any such corporation, shall be deemed to have expired; provided

that **this act** shall not affect any action now pending.

"**Section 2.** This act shall take effect and be in force from and after its passage and publication."

Approved May 12, 1911.

Laws of Wisconsin, 1911, p. 139.

By virtue of this Act, the Legislature had evidently intended to validate the titles acquired by all non-complying foreign corporations which had, *after* acquiring such titles and *before* the passage of the Act in question, *complied* with Section 1770b, with the proviso contained in Section 2 of the Act that actions to attack titles acquired by non-complying foreign corporations were required to be instituted within one year from the *passage* of the *Act*, and that the failure so to do should deprive any party of his right of action or defense, based upon the failure of such corporation to comply with Section 1770b.

Following the adoption of the 1911 statute, the Wisconsin Supreme Court had occasion to consider the effect of said amendment upon the prior state of the law relating to the rights of non-complying foreign corporations under Sec. 1770b to titles acquired, in the case of

Lanz-Owen Company v. *Garage Equipment Co.*, 151 Wis., 555,

in which it was contended that the effect of the amendment of 1911 was to "validate the instrument from its inception." That court *rejected* that view, and held:

"By the first section of the amendment, the disability of a foreign corporation that, pre-

vious to the amendment thereof, had complied with Sec. 1770b, was removed, so far as it related to the acquisition and holding of property acquired or attempted to be acquired. * * * But such removal of disability dates from and after the time the Act took effect. *It does not relate back to the date of the contract, much less validate the contract from the time it was made. * * * It says nothing as to validity or invalidity of any contract previously entered into relative to the same.*"

The opinion of the Wisconsin Supreme Court in the case quoted from was rendered *on January 8, 1913.*

On the 10th of May, 1913 (slightly over four months after the *Lanz-Owen* decision) the Legislature amended Section 1770j as adopted in 1911, by a new Act approved May 10, 1913. This Act is as follows:

CHAPTER 212.

"AN ACT to amend Section 1770j of the statutes, relating to titles to real property acquired by foreign corporations before being admitted to do business pursuant to Section 1770b of the statutes.

"The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

"**Section 1.** Section 1770j of the statutes is amended to read: Section 1770j. 1. Any corporation organized otherwise than under the laws of this state, having acquired, or attempted to acquire, legal title by deed, or lease to any real property in this state, before complying with the terms of Section 1770b of the statutes, and which has thereafter, and before the passage of **this section,** complied with said section, shall be and is hereby relieved from any disability provided in said statute or prohibition therein contained, so far as said section relates to the acquisition and holding of the property so ac-

quired, or attempted to be acquired, *and the title so acquired, or attempted to be acquired, is hereby confirmed.*

"2. Any person claiming that the legal title of any corporation or of any person claiming by, through or under such corporation, to any real property acquired, or attempted to be acquired, is invalid by reason of the failure of any corporation coming within the terms of **Sub-section 1** of **this section**, to comply with Section 1770b of the statutes, shall commence action to recover the property, or to declare the legal title of said corporation void, or interpose a defense on such grounds, within one year from the **passage** and publication of **this section**, and in case of failure to do so his right of action or defense, based upon the failure to comply with said section by any such corporation, shall be deemed to have expired; provided that this **sub-section** shall not affect any action now pending.

"**Section 2.** This act shall take effect upon passage and publication."

Approved May 10, 1913.

Laws of Wisconsin, 1913, p. 218.

This court will observe that by Section 1 of the amendatory Act, the Legislature declared not only that non-complying foreign corporations, *thereafter complying,* should be relieved from any disability or prohibition contained in Section 1770b, but also that the title so acquired or attempted to be acquired by any such corporation *was in terms confirmed.* This change and amendment of the Act of 1911, following, as it did, immediately after the rendition of the decision in the *Lanz-Owen* case, was most significant as evidencing the legislative intent in the passage of the 1913 amendment. Obviously, the Legislature regarded that the 1911 Act (original

Section 1770j) had, in the light of the opinion of the Wisconsin Supreme Court, failed effectually to carry out the intent of the Legislature; and there, promptly thereafter, followed this new legislation obviously designed to remedy the shortcomings of the earlier statute which had been pointed out in the *Lanz-Owen* opinion, and to *confirm* the titles of *all* corporations *complying* before the 1913 enactment.

It is important, however, to point out additional changes in the Act of 1911, brought about by the amendment of 1913, as clearly indicative of the legislative intent to include within the purview of the later Act *all* non-complying foreign corporations, complying *prior* to its passage *on May 10, 1913.*

The Act of 1911 consisted of two Sections, denominated Sections 1 and 2. Section 1 was in turn divided into two sections—*i. e.,* Sub-section 1 and Sub-section 2. In dealing with matters having reference to time, the Legislature in the passage of the Act of 1911, used the word "Act," it appearing once in Sub-section 1 of Section 1, three times in Sub-section 2 of Section 1, and once in Section 2. (See black-face type.)

In defining what particular class or group of corporations came within the purview of the new Act of 1911, the Legislature stated that all foreign corporations acquiring title, or attempting so to do, before complying with Section 1770b, and which had "*thereafter* and *before* the *passage* of this **Act,** complied with said section" (Section 1770b), should be and were relieved from disability, etc.

In Sub-section 2 of Section 1, the Legislature again provided, in fixing the limitation of time for

the commencement of actions to attack the titles of non-complying foreign corporations coming within the purview of Sub-section 1, that such action should be brought "within one year from the *passage* and publication of this **Act,**" adding the proviso that "this Act shall not affect any action now pending."

Section 2 of the Act dealt with the time when the *entire Act* should take effect.

Looking now at the amendatory Act of 1913, defining the class of corporations, we find that the amendatory Act again consists of two sections, denominated Section 1 and Section 2 (Section 1 being again divided into two sub-sections), Section 1 dealing with the amendment of the Act of 1911, and Section 2 fixing the time when the new Act should take effect.

In prescribing the class or group of corporations which should come within the beneficent provisions of the amendatory Act of 1913, and in fixing the period of time within which actions to attack the titles of corporations coming within the purview of Sub-section 1, should be commenced, the Legislature, with the intent of changing, extending and enlarging the class or group of corporations so as to include those which *had complied* between May, 1911, and May, 1913, instead of using the word "Act," as it had repeatedly done in the instance of the statute of 1911, used in lieu thereof the words "*this section*" in both Sub-section 1 and Sub-section 2 of Section 1 of the Act of May, 1913, referring to and meaning the *first* and *second* sections respectively of the amendatory Act of 1913. (See blackface type.)

Thus, in describing the corporations whose title was to be confirmed, Sub-section 1 provided that all those not complying, and which have "thereafter and *before* the *passage* of this *section* complied with said section" (Section 1770b), should be relieved, etc., and in prescribing the period of limitation in Sub-section 2, that sub-section provided that as to "any corporation coming within the terms of Subsection 1 of *this section,* the other party shall commence action to recover the property • • • within one year from the passage and publication of *this section,*" adding the proviso that "this *subsection* shall not affect any action now pending."

Not satisfied with this second curative legislation, the Legislature on May 11, 1917, passed another Act known as Chapter 211 of the Laws of Wisconsin of 1917, at the same time amending Subsection 2 of Section 1770b by providing, by the addition of appropriate language, among the classes or groups of corporations to be excluded from compliance with Section 1770b, "corporations not organized or conducted for profit." (For the language of this Act see Supplement, *infra,* p. 62.)

This amendment of Sec. 1770b operated to relieve non-profit-sharing corporations which might, *after May* 11, 1917, desire to transact business, or acquire, hold or dispose of property in Wisconsin, from complying with the other provisions of Section 1770b; but it had, *standing alone,* no effect upon **conveyances** to that class of corporations *failing* to *comply* with Section 1770b *prior* to May 11, 1917.

The title of the Act of 1917, and its provisions other than Sub-section 2 of Section 1770b as thereby amended (see Supplement, *infra*, p. 62), are here reproduced.

Particular attention is called to the fact, at this point, that the amendatory curative Act of 1917 does *not* purport to amend the Act of May, 1913 (which in and of itself was amendatory of the Act of 1911), but does in terms directly amend Sub-section 1 of Section 1770j, *as originally passed in May, 1911.*

This Act is as follows:

CHAPTER 211.

"AN ACT to amend subsection 2 of section 1770b and subsection 1 of section 1770j of the statutes, relating to the filing of articles of incorporation by foreign corporations.
"The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

"**Section 1.** Subsection 2 of Section 1770b and Sub-section 1 of Section 1770j of the statutes are amended to read:

"(Section 1770b) 2. . . . . .

"(Section 1770j) 1. Any corporation organized otherwise than under the laws of this State, having acquired, or attempted to acquire, legal title by deed, or lease to any real property in this State, before complying with the terms of Section 1770b of the statutes, and which is now not required to comply with said section, or which has thereafter, and before the passage of **this section**, complied with said section, shall be and is hereby relieved from any disability provided in said statute or prohibition therein contained, so far as said section relates to the acquisition and holding of the property so acquired, or attempted to be ac-

quired, and the title so acquired, or attempted to be acquired, is hereby confirmed.

"**Section 2.** This Act shall take effect upon passage and publication."

Approved May 11, 1917.

It will be noticed that the Act of 1917 again consists of two sections, denominated Section 1 and Section 2, Section 1 dealing with the amendments to Sub-section 2 of Section 1770b, and Sub-section 1 of Section 1770j, whereas Section 2 of the Act provided when the Act should take effect.

The same changes and differences between the provisions of Sub-section 1 of Section 1770j as passed in 1911, and those of the same subsection as passed and amended in 1917, are present as have been previously pointed out in analyzing the differences between the Acts of 1911 and 1913, the words "this section" being *in each instance* substituted in the Act of 1917 for the words "this Act," appearing in the original statute of 1911.

In specifying the classes or groups of corporations to be included within the purview of the Act, and in order that *all* non-profit-sharing corporations, whether previously complying *or not*, might be so included, as well as *those* profit-sharing corporations *complying* with Section 1770b *prior* to the passage of the Act of 1917, the Legislature included in Sub-section 1, as thus amended, the words "and which is *now* not required to comply with said section." It was evidently recognized that, *without* a further amendment of the curative statute as applied to *such* non-complying corporation, titles acquired *prior* to May, 1917, by such non-profit-

sharing corporations (at which time *such* corporations were *for the first time exempted* from a compliance with Section 1770b), would be left subject to attack and that the amendment of Section 1770b, exempting non-profit-sharing corporations, would have only a *prospective* operation.

A.

The Wisconsin Supreme Court, as shown by its opinion in the case at bar, erroneously assumed that the question involved is, whether the Legislature had intended by the enactment of Sub-section 1 of the Act of 1917 to confirm and validate the titles theretofore attempted to be acquired by ALL foreign corporations which had NOT complied with Section 1770b, and,

Based on such incorrect assumption, has erroneously concluded that the Legislature could, in that event, have had no object in amending Section 1770j by the inclusion of words dealing specially with exempted non-profit-sharing corporations, because, so it is said, corporations not for pecuniary profit would have been included within the earlier enumeration in the act, of "any corporation organized other than under the laws of this State."

Hence, having such wrongly assumed legislative intent in mind, the court erroneously held that the words "which is now not required to comply with said section," would, upon that hypothesis, have been superfluous, and deduced the conclusion that their use showed an intent to legislate only as to such exempted corporations.

As already previously pointed out, the question is not, whether the legislative intent was to confirm and validate titles of *all* non-complying foreign corporations, whether later complying with Section 1770b, *or not*. As previously pointed out, our contention only is that the Legislature intended to confirm titles as to all such non-complying profit-shar-

ing foreign corporations *only* as had *complied* with Section 1770b *prior* to the *passage* of the curative Act of 1917.

Having in mind the erroneous assumption of the Wisconsin Supreme Court, it is readily understandable how that court should have fallen into the error of assuming that corporations not organized for profit would have been included within the earlier language of the Act, "any corporation organized other than under the laws of this State," so as to obviate the necessity of the insertion of the words in Section 1770j as amended, "which is now not required to comply with said section." This court will see at once, we have no doubt, that inasmuch as the words appearing in the earlier part of the statute, "any corporation organized other than under the laws of this State," are immediately followed by the modifying clause, "which has thereafter and before the passage of this section *complied* with said section," *non-complying* non-profit-sharing corporations *which have never at any time prior to the passage of the amendatory Act of 1917 complied with Section 1770b,* would *not* (as suggested by the Wisconsin Supreme Court they would) have fallen within the enumeration or classification of corporations covered by the preceding *introductory* language of the section in question referred to by that court.

Inasmuch as the legislative intent was to cure and confirm the defective titles of *all* non-complying, non-profit-sharing corporations which had failed to comply with Section 1770b, *whether they had subsequently complied with that section or not,* it was

necessary, in order that the curative Act should include non-complying, non-profit-sharing corporations which had *continued to fail to comply* prior to 1917 (and which therefore would *not* fall within the earlier language of the Act), to use appropriate phraseology, which would apply to and include such continuously non-complying, non-profit-sharing corporations. This was accomplished by the insertion of the words "and which is *now* not required to comply with said section."

In other words, the Act of 1917 was admittedly intended to cure the titles of *all non*-profit-sharing corporations, *whether complying at any time or not with Section 1770b,* whereas, in the case of *profit*-sharing corporations, it was intended to cure the titles of only *such non*-complying corporations which, *prior* to the *passage* of the amendatory Act of 1917, *had complied;* hence, it is respectfully submitted, that it is not sound reasoning to work out the legislative intent in the passage of Sub-section 1 of the Act of 1917, from the erroneous assumption that the insertion of the words "which is now not required to comply with said section" was superfluous because of the unfounded conclusion that non-profit-sharing corporations not complying, and continuing to fail to comply, prior to 1917, would have been included in and embraced the phrase "any corporation organized other than under the laws of this State," when the *contrary* was the case.

Without the inclusion of the words making direct reference to non-profit-sharing corporations which were exempted by the amendment of Sub-section 1 of Section 1770b, the object intended to be attained

by the Legislature as to such corporations would not have been accomplished, *i. e.*, the validating of conveyances to *non*-profit-sharing corporations which had never complied with Section 1770b. In this connection it should be borne in mind that the amendment of Section 1770b by the Act of May, 1917, whereby non-profit-sharing corporations were exempted from compliance with Section 1770b, applied only to non-profit-sharing corporations thereafter coming within the State of Wisconsin or thereafter acquiring property within the State. That part of the Act, while remedial in its nature, was prospective in terms. Nothing in that part of the Act shows a contrary intention on the part of the Legislature. The exemption became operative only from and after the passage of the Act of 1917, and had no relation to the status of non-profit-sharing corporations which, prior to 1917, had violated the provisions of Section 1770b as originally enacted.

These non-complying, non-profit-sharing corporations therefore would continue to have been, even after the amendment of Section 1770b, *thereafter* exempting non-profit-sharing corporations from compliance with that section, in the position of having voidable titles to real estate, whether they had, prior to May, 1917, complied with Section 1770b or not. Hence it was necessary, in order that the titles of such non-complying corporations which had not previously complied with Section 1770b, be cured, to mention such corporations by appropriate language, in terms, in the curative Act of 1917.

Consequently, it does not follow, as the Wisconsin Supreme Court held, that because the Legisla-

ture intended to cure the titles of non-profit-sharing corporations, whether previously complying with Section 1770b or not, after having acquired their titles, and to accomplish that end, used the words, "which is now not required to comply with said section," the Legislature may not also have intended (as we contend it did) by the use of the words, "or which has thereafter and before the passage of **this section** complied with said section," to confirm and cure the titles of all non-complying, profit-sharing corporations which, prior to the passage of the Act of 1917, *had complied* with Section 1770b. This is so especially if, as we contend, the Legislature intended to accomplish *both* objects by the passage of the amendatory, curative Act of 1917.

B.

The Wisconsin Supreme Court has erroneously assumed that the words, "before the passage of this section," are not a part of the amendment, but were a part of Section 1770j as it was originally created, and hence its conclusion, based on that assumption, that the curative statute of 1917 did not and was not intended to bring within the provisions of that section all profit-sharing corporations which had complied with the law subsequent to the passage of Chapter 142 of the Laws of 1911, and prior to the passage of the amendatory Act of 1917, is founded on misconception of fact, making inapplicable the rules of statutory construction relied upon by the court.

The Wisconsin Court not only fell into error in the respects pointed out under Point A, *supra,* in reaching a conclusion as to legislative intent in the passage of the curative statute of 1917, but also further predicated its conclusion as to the legislative intent, upon the erroneous assumption that the cura-

tive Act of 1917 *repeated the identical language* of the original Act of 1911 creating Section 1770j, in so far as the use of the words, "before the passage of this section," is concerned. That court, in dealing with this branch of the case, immediately following the question discussed under Point A herein, said, in its opinion:

> "The re-enactment of Sec. 1770j for the purpose of admitting a new class of corporations, to-wit, that 'which is not now required to comply with said section,' did not and was not intended to bring within the provisions of that section all corporations which had complied with the law subsequent to the passage of Ch. 142 of the laws of 1911 which created and enacted Sec. 1770j. *The words, 'before the passage of this section,' are not a part of the amendment, but are a part of Sec. 1770j as it was originally created.* The repetition of language in an amending statute which provides that the original section shall be amended to read as follows, does not repeal and re-enact the repeated language, but the *repeated* part remains in force as of the time of the original enactment, in the absence of a clearly expressed legislative intent to the contrary." (Rec., 40.)

An examination of the language of Section 1770j as originally enacted in 1911 (p. 37, *supra*), will at once demonstrate the error of the court. The terms under discussion appearing in the curative Act of 1911 were *not repeated* in the Act of 1917. The Act of 1911 uses the phrase and words, "before the passage of this **Act,**" whereas the amendatory, curative Act of 1917 uses the phrase "before the passage of this **section.**"

It should be again pointed out in this connection that the amendatory, curative Act of 1917 does not, either by its language or its title, purport to amend the amendatory, curative Act of 1913, but does amend, and so purport to do by its title, the *original* curative Act of May, 1911, whereby Section 1770j was first brought into existence.

If the amendatory, curative Act of 1917 does not repeat the identical language contained in the original curative Act of 1911, then it follows as a matter of course that the principle of statutory construction to the effect that the repetition of language in an amended statute, providing that the original section shall be amended to read as follows, continues in force the original Act as of the time of its first enactment as to that part of the Act which is repeated, is not applicable. In the case at bar, there is not a repetition of the identical language, but a change of a vital and controlling nature, clearly indicative of a legislative intent to bring about a change in the original Act and to make the amendatory Act speak of a time different from that contemplated by the Act originally passed and necessarily as of the time of the 1917 enactment.

We do not believe that counsel for plaintiffs in error are presuming too much to infer from the language used by the Wisconsin Supreme Court that it was of the opinion that the Legislature, by the passage of the amendatory, curative Act of 1913 and by the change of the phraseology of the section in the respects referred to, intended to make the later Act apply to all corporations, originally not complying, but later complying, **before the passage** of the

amendatory, curative Act of 1913. If our interpretation of the Wisconsin court's opinion in this regard is correct, then no reason can be perceived or suggested why the use of the word "section" in the curative Act of 1917 (which Act, it should be remembered, was in terms stated to be an *amendment* of the *original Act of 1911*, creating Section 1770j, and *not* of the Act of 1913), should not be given the same effect and vitality in the Act of 1917, as has been at least intimated might be the case with respect to the amendatory, curative Act of 1913, and be presumed to have been therein used for the accomplishment of the *same* legislative purpose and an expression of the same legislative intent.

While plaintiffs in error cannot claim any *direct* advantage from the curative Act of 1913, because the Realty Company had *not* complied with Section 1770b before October 5, 1915, yet it seems to us that, in arriving at the legislative intent in the passage of the curative Act of 1917, the fact is of controlling and cogent force that there have been *successive* legislative enactments, *each* one of which was *curative* in its nature and *each* designed to bring within the scope of each new Act *new* classes or groups of corporations, as to which such curative Acts should be applicable.

Such successive enactments are *strongly indicative* of the trend and bent of the legislative policy, and evince the legislative intent *to cure* titles of non-complying corporations thereafter complying or subsequently exempted from the operation of Section 1770b. Therefrom may very properly be de-

duced the conclusion that while the Legislature was not disposed, as the Wisconsin Supreme Court points out in its opinion, to *repeal* Section 1770b, yet as applied to all non-profit-sharing corporations,—whether complying or not, and as to all profit-sharing corporations which *had complied after* acquiring titles (thereby removing the disqualification and obviating the "technicality" referred to by that court in *Mortensen* v. *Murphy*),—the Legislature intended that the penalty flowing from the original violation should *not* be enforced as against, or defeat the titles of, such exempted, or subsequently *complying* corporations.

If the use of the words "this section" in the Act of 1913 had the effect of curing the titles of all corporations complying with Section 1770b prior to the Act of May, 1913, then the *same* words as used in the curative Act of 1917 confirmed the titles of *all* such profit-sharing corporations as had, *before* the passage of that "(this) Section" in 1917, *complied* with Section 1770b.

It would seem to follow that the effect of the holding of that Court that only such profit-sharing corporations as had complied before 1911, were included in the 1917 curative Act, necessarily is (although that Court does not say so expressly) that the 1913 curative Act had no effect on titles acquired by corporations complying between 1911 and 1913, and hence renders nugatory and inoperative that enactment.

We submit that no construction should bring out any such result, since each statute should receive an interpretation as will make it operative and effective to accomplish the result of the legislative will.

C.

The "presentness" of the language used throughout the 1917 curative Act demands that it be construed as also embracing PROFIT-SHARING corporations that had, at the time of its passage, complied with Section 1770b.

The use of the words "now" and "this section" in the same paragraph, forming part of the curative Act of 1917, conveys and expresses the idea of "presentness" of operation as applied to those affected by its passage and to which the respective words relate.

That the Legislature did this with respect to *non*-profit-sharing corporations (whether previously complying *or not*), by the amendment in 1917 of Section 1770b and the amendatory, curative Act of 1917, is an admitted fact. The titles of all *such* corporations were thus *confirmed*.

It is to be noted that the language of the amendatory, curative Act of 1917, when dealing with the titles of non-profit-sharing corporations, uses the *present tense:* "which is *now* not required to comply with said section." In other words, the curative Act of 1917 purported to deal, and dealt, with the *then present* conditions and titles of *such* foreign corporations, *then* under disability and in default.

As respects profit-sharing corporations, we find on reading the language of the Act, that the *present* tense is *again* used: "which has thereafter and before the passage of *this* section complied with said section."

As to *both* these classes of foreign corporations, therefore, *i. e.*, exempted corporations, and also

profit-sharing corporations complying prior to May, 1917, the Act provides that each of the same "shall be and *is hereby* relieved from any *penalty* provided in said statute or *prohibition* therein contained, so far as said section relates to the acquisition and holding of property so acquired, or attempted to be acquired, and the title so acquired or attempted to be acquired is confirmed."

If the words "**this** section" are not to be given a construction of *presentness*, then it is difficult to understand why such words should have been used by the Legislature, or why there should have been *any change* in the language of the Act of 1911, containing the phrase "before the passage of this **Act.**"

It should again be pointed out that the 1917 curatice act was an amendment of the *1911* Act, and none other.

If, as Wisconsin Supreme Court has held, the words "**this** section" had relation to Section 1770j as passed in 1911, why was that language of the Act not left as it was passed in 1911? If it *had* been so left, which it was *not*, there would be some ground for the contention that the repeated language should be treated as a mere continuing in force of the provisions of the original Act in that regard.

If the words "**this** section" were intended to relate to Section 1770j, rather than to Section 1 of the Act of 1917 as contended by us, why was not appropriate language used to express *that* purpose? Is it not more accurate and reasonable to conclude that the use of the words "**this section**" has reference

either to *Section 1* of the curative Act of 1917, or if not, then to Section 1770j **as amended in 1917**, of which "**this section**" is an integral part?

Why give the curative Act of 1917 a construction of *presentness* as applied to *non*-profit-sharing corporations by reason of the use of the word "now," and yet give it a *different* construction as to *profit*-sharing corporations, when language expressing *presentness* is used, as has been pointed out, by the use of the words "**this section**" by the Legislature in the amendatory Act of 1917 as applying to *both* classes or groups of corporations?

This is the effect of the decision of the Wisconsin Supreme Court in the opinion filed, since that court has held that as to *profit*-sharing corporations, the titles of *only such* as had complied, *prior to May 10, 1911* (the date of the original creation of Section 1770j), should be deemed confirmed by the curative Act of 1917.

What *possible reason* can there exist for any such differentiation or discrimination?

Looking at the matter from the standpoint of the intent of the Legislature (and this, of course, is the cardinal rule of construction), what could have led the Legislature to distinguish, as it has been held it has, in this respect, between *profit*-sharing corporations and *non*-profit-sharing corporations, or between profit-sharing corporations complying *before* May, 1911, and those complying *after* May, 1911, and *before* May, 1917? Each class of corporations was *equally guilty* of a violation of Section 1770b, but on the other hand, *each* class *has complied* with its provisions *subsequently* to acquiring title; hence

each has *equally* satisfied the State's requirements under the law in question and has removed itself from the ban and penalty of Section 1770b.

Inasmuch as the idea of *presentness* has been expressed by the curative Act of 1917 with respect to *non*-profit-sharing corporations, what is there, if the matter is controlled by the legislative intent, which should cause the Legislature *to so discriminate* as to *favor* one class of corporations, *i. e., those exempted,* and another group, *i. e., profit*-sharing corporations *complying before* May, 1911, and yet have attributed to it the intent of *discriminating against profit*-sharing corporations *complying* with Section 1770b *after* May, 1911, and *before* May, 1917?

Section 1770b, as originally adopted, was passed in 1898. If the original confirmatory Act of 1913 had merely attempted to cure the titles of those corporations which, for a *short period of time* subsequent to the passage of Section 1770b, had violated its provisions, during which period the effect and construction of that Act had not been fully understood or was still in doubt, and a discrimination had been exercised by the Legislature in favor of *such* corporations, but *not* in favor of those *subsequently* violating Section 1770b, one might perceive some reason for such discrimination; but the import and effect of Section 1770b, adopted in 1898, was understood *long before* 1911 or 1913, and the discrimination therefore cannot be explained upon any *such* hypothesis. Indeed, no *plausible* explanation for such discrimination, or for *any* reason to discriminate, can be assigned.

On the other hand, if the construction contended for by plaintiffs in error prevails, *no discrimination* in point of fact exists, but *all* offending *profit*-sharing corporations *complying subsequently,* and all *exempted non-profit*-sharing corporations, are *equally* favored and *uniformly* treated.

In the construction of this statute, courts will not attribute to the Legislature the intent to accomplish a result which would be purely arbitrary, and without being predicated upon any reasonable basis of classification of corporations, because to do so, would be to impute to the Legislature an intention to accomplish an *absurd* result, *not* based on *reason* or *justice,* nor tending in any wise to bring about a subsequent compliance with the Foreign Corporation Act by profit-sharing corporations.

That it is the public policy of Wisconsin, as declared in its legislation, to *encourage* such *subsequent* compliance by foreign corporations, appears from the fact of the passage of the curative Acts of 1911, 1913 and 1917.

The language of Judge Cooley in

People v. *Circuit Court of Wayne County,* 37 Mich., 287,

is pertinent in this connection. That learned jurist, in dealing with an 1869 amendment of a statute adopted in 1847, which was in form an *amendment* of the *entire* section, after stating the general rule announced by this court, said:

> "It is further urged that, *as a rule of construction, a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does as amended.* This is true as a rule. *Conrad* v. *Nall,* 24 Mich., 277.

But such a rule of construction cannot be applied when the effect would be to defeat the manifest intent of the Legislature in adopting the amendment. And such would be the effect in this case. The statute which was amended took effect March 1, 1847. Now, to make an amendment adopted in 1869, and which speaks of judgments previously rendered, apply to those only which were rendered previous to March 1, 1847, *when the amendment itself contemplates that some of the judgments will have some portion of ten years of the time of their rendition within which to bring suit, is a manifest absurdity. The court putting such a construction upon the amendment would know the intent of the Legislature was being defeated thereby. No court is justified in doing that. Rules of construction of statutes must aim at reaching the legislative intent, and must not defeat it where it is manifest.*"

While possibly the Legislature may *expressly* discriminate without any good reason, it does not seem that the rules of statutory construction permit such discrimination to be *read into* its legislation, when it does not appear in the context of the 1917 curative Act, but where on the contrary, *no* differentiation is found to be stated therein in express terms, between profit-sharing corporations which complied *before* 1911 or 1913, and those which complied *subsequent* to those years and *prior* to 1917.

Moreover, it seems to us that the 1917 Act, being curative in nature, authorizes an indulgence of the presumption that the Act embraces all contracts made up to the time of the passage of said Act, as well as those made before 1911 or 1913, in the absence of any language in the Act to the contrary.

Curative Acts admittedly relate to past transactions —are *retrospective* and not prospective in character and operation—and so long as it appears that the transaction in the instant case is such a past one, it should be presumed that it comes within the Act.

Respectfully submitted.

WALTER BACHRACH,
HAMILTON MOSES,
THOMAS M. KEARNEY.

Supplement.

Section 1770b.

2. No corporation, incorporated or organized otherwise than under the laws of this State, except railroad corporations, corporations or associations created solely for religious or charitable purposes, insurance companies and fraternal or beneficiary corporations, societies, orders and associations furnishing life or casualty insurance or indemnity upon the mutual or assessment plan, or corporations not organized or conducted for profit shall transact business or acquire, hold or dispose of property in this State until such corporation shall have caused to be filed in the office of the Secretary of State a copy of its charter, articles of association or incorporation and all amendments thereto, duly certified by the Secretary of State of the State wherein the corporation was organized * * * and provided, further, that except as regards the advancing and loaning of money and the taking, acquiring, holding and enforcing of securities, as above provided, nothing herein contained shall be construed as authorizing any foreign corporation to transact in this State the business of a bank or trust company, or otherwise to exempt any foreign corporation (other than the railroad, religious, charitable and insurance corporations and corporations not organized or conducted for profit above specified) from the provisions of this section or other statutes of this State. Nothing in this section contained shall affect the rights of parties in any action which may now be pending.

Chapter 212, Laws of Wisconsin, 1917.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1919.

No. 288

C. B. MUNDAY, Trustee; LA SALLE STREET TRUST AND SAVINGS BANK and WILLIAM C. NIBLACK, as Receiver of said La Salle Street Trust and Savings Bank,
Plaintiffs in Error,

vs.

WISCONSIN TRUST COMPANY and FREDERICK ROBINSON,
Defendants in Error.

BRIEF IN BEHALF OF DEFENDANTS IN ERROR.

I.

Nature of Case.

As stated in the brief of counsel for plaintiffs in error, this case involves a consideration of the Statutes of the State of Wisconsin relating to foreign corporations, and embraces what were originally two independent actions consolidated and tried as one.

The grounds of the complaint in Action Number One and of the defense in Action Number Two are correctly stated on page 3 of the brief in behalf of

plaintiffs in error, but it is hardly accurate to state, as on page 2 of said Brief, that the action was brought to "rescind" the instruments there mentioned, in the ordinary sense of that term.

On the contrary, the action proceeded upon the theory that the deeds in question from the Wisconsin Trust Company and from Frederick Robinson and wife to the foreign corporation, Realty Realization Company, were void *ab initio* by reason of the non-compliance by that corporation with the Wisconsin Statute and hence that no title passed which it could convey or its grantee could mortgage.

As stated, this contention was sustained by the trial court and also by the Supreme Court of the State of Wisconsin.

Sundry objections were made during the trial of the action and again urged in the State Supreme Court to the enforcement of the statute as against plaintiffs in error to the extent of annulling the conveyances in question on the ground of repugnancy to the State and Federal Constitutions, all of which objections are now summarized in the contentions that the State law as administered by the State Court is violative of the "contract" clause and the "due process" clause of the Federal Constitution.

A further contention is here made that the legislature of Wisconsin, by an amendatory act adopted on May 11, 1917, validated the conveyance in question and confirmed the title of the Realty Realization Company, its successors and assigns, to the property in dispute. This involves the construction of a local statute, a question which the Supreme Court of the

State of Wisconsin resolved against the plaintiffs in error, and which, as we shall contend, is not open to review in this court.

II.

Statement of Facts.

Supplementing the statement of facts contained in the brief for plaintiffs in error, attention is called to the following details, not, perhaps, very material to the constitutional questions here raised, yet informing as to the real history and merits of the case.

1. The Realty Realization Company, a Maine corporation, having its principal office in Chicago, Illinois, was an outlaw in the latter state as well as in Wisconsin, where it attempted to acquire title to the real estate in question—having failed to comply with the law of either state so as to entitle it to do business or acquire property therein. (Finding 3, Trans. 16.)

2. The deeds from Frederick Robinson and wife and from Wisconsin Trust Company to the Realty Company, and the contract between Robinson and the Realty Company embodying the terms of the agreement of sale, the latter dated one day later than the deeds, were delivered simultaneously at Chicago, Illinois, on February 28, 1913. (Finding 5, Trans. 17.)

3. Only $5,000 of the agreed purchase price of $75,000 was paid in cash, the balance being represented by the promissory notes of the Realty Company, secured by the deposit of its preferred stock as collateral.

4. The transaction was a fraud upon Mr. Robinson of the grossest sort, and the Realty Company, represented to him as a financially strong and prosperous company, was upon its last legs, so to speak, at the time thereof; was in the bankrupt court within six weeks thereafter; and when judgment was entered herein four years later, had paid no dividend at all to creditors nor shown a prospect of any. (Finding 8, Trans. 18.)

5. The deeds to the Realty Company, and the deed from it to Horace E. Walter, a clerk in its office, all unrecorded, and all showing upon their face that that company was a Maine corporation attempting to deal with the title to land in Wisconsin, were delivered to the La Salle Street Trust and Savings Bank, along with the trust deed to C. B. Munday, its Vice- President, under which it claims, thereby charging the bank and said Trustee with notice of the facts and putting them upon enquiry as to the right of the corporation to acquire, hold and convey real estate within that state. (Finding 14, Trans. 19; Finding 15, Trans. 20.)

6. There is *no finding* that the Realty Company ever complied with the foreign corporation statute of Wisconsin, but there is an express finding that it had not so complied prior to the commencement of the action. (Finding 3, Trans. 16.) However, there was offered in evidence upon the trial (which began October 1st, 1915) a certificate from the Secretary of State reciting a compliance on October 5th, 1915—that is to say, *while the trial was in progress.* Since the statute required the applying corporation to file,

in addition to a copy of its Articles, a sworn statement of, among other things, the nature of the business to be transacted within the State, and the proportion of its capital stock represented thereby (Sec. 1770b, Wis. Stats., 1915), and since the Realty Company had then been hopelessly bankrupt for a period of over two years, it would *seem* that this resourceful company must have found a new victim in the Secretary's office. And upon this slender thread of farcical compliance, coupled with an alleged curative statute passed in 1917, which the Supreme Court of Wisconsin held to have no application, counsel for plaintiffs in error hang their most strenuous argument for reversal.

III.

A

Argument.

Section 1770b of Wis. Stats., either as written or as administered by the Supreme Court of the State of Wisconsin, neither impairs the obligation of the contract and deeds in question nor deprives plaintiffs in error of their property without due process of law.

The first proposition of plaintiffs in error is that under Section 1770b, Wis. Stats., and more particularly sub-section 10 thereof, both as written and as construed by the Supreme Court of Wisconsin, prior to the making of the contract and the execution and

delivery of the deeds in controversy, such deeds were merely voidable and not void, and that such statute as now administered and enforced against plaintiffs in error by the Supreme Court of Wisconsin so as to render such deeds absolutely void, impairs the obligation of such contract and deeds, and deprives the plaintiffs in error of their property without due process of law.

At the time of the transaction in question, the applicable statute of the State of Wisconsin, expressing conditions upon which foreign corporations should be admitted to transact business and acquire property within the State, was Section 1770b, Wis. Stats., 1911. This section comprises twelve separate numbered paragraphs or subsections, of which the portions material to the case under consideration, are as follows, the italics being ours:

> Sec. 1770b. 2. No corporation, incorporated or organized otherwise than under the laws of this state, except railroad corporations, corporations or associations created solely for religious or charitable purposes, insurance companies and fraternal or beneficiary corporations, societies, orders and associations furnishing life or casualty insurance or indemnity upon the mutual or assessment plan, shall *transact business or acquire, hold, or dispose of property in this state* until such corporation shall have caused to be filed in the office of the Secretary of State, a copy of its charter, articles of association or incorporation, and all amendments thereto duly certified by the Secretary of State of the state wherein the corporation was organized. * * *

Sub-section 3 prescribes the details of a sworn statement to be filed with the articles, together with an

appointment of the Secretary of State as attorney for the service of process, and an agreement to comply with all laws of the state relating to foreign corporations.

* * * * * * *

> Sec. 1770b. 10. Every contract made by or on behalf of any such foreign corporation, affecting the personal liability thereof, *or relating to property within this state,* before it shall have complied with the provisions of this section, *shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them.*

Sub-section 11 provides a penalty of $500 against an offending corporation, its officers and agents for a violation of any of the provisions of the section.

So far as these provisions are concerned, the statute was identically the same when the Supreme Court of Wisconsin, on April 1, 1902, handed down its decision in the case of *Ashland Lumber Co. vs. Detroit Salt Co.,* 114 Wis. 66. This was an action to recover a balance alleged to be due to the plaintiff for lumber sold and delivered to a co-partnership consisting of one individual defendant and two non-complying corporations of the State of Michigan. The defendants counter-claimed, alleging breach of the same contract sued upon, and upon trial recovered a verdict and judgment for $2,750 on said counter-claim. The judgment was reversed on plaintiff's appeal on the ground that under the statute, the contract was void and unenforcible in behalf of the foreign corporations, and the individual defendant being a co-partner with them, could take nothing as an individual.

The constitutionality of the act was sustained against a vigorous and determined attack.

As to the construction thereof, the court said:

> "One contention on the part of the defendants is that the words 'shall be wholly void' in the last clause of the statute quoted, should be construed to mean simply *voidable at the option of the plaintiff*, and not absolutely void and a nullity. After careful consideration, this court has recently held that where the statute provides that the act shall be void, and fixes a penalty for the perpetration of the prohibited act, the word 'void' should be interpreted as meaning *void absolutely*, in accordance with the technical accuracy of the word (citing *Land L. & L. Co. vs. McIntyre*, 100 Wis. 245).
>
> The section in question is highly penal. 'The failure to comply with any' of its 'provisions' subjects the corporation, 'or any agent, officer or person acting for it in this state, to a penalty of $500,' for the first violation, and $1,000 for any subsequent violation. We must hold that the words 'shall be wholly void on its behalf and on behalf of its assigns, but shall be enforcible against it and them,' mean just what they say; and if they are valid they render the contract in question absolutely void and a nullity *in so far as it is sought to be enforced on behalf of the defendants by way of counter-claim in this action.*"

After this decision of the Supreme Court of Wisconsin, and with the above construction of the statute before it, the Supreme Court of the United States in the case of *Diamond Glue Company vs. United States Glue Company*, 187 U. S. 611, on January 5th, 1903, sustained the validity of the same statute overruling the contention that it was retroactive in character because prohibitive of the transaction of busi-

ness after the statute went into effect under a contract made before that date, but after the passage of the act, and also overruling the contention that the statute violated the "contract clause" of the Federal Constitution.

Thereafter, the Supreme Court of the State of Wisconsin, in *Allen vs. Milwaukee,* 128 Wis. 678, held a contract for street paving entered into by the City of Milwaukee with a non-complying foreign corporation was *void* by force of the statute, and enjoined the performance thereof at the suit of a taxpayer, notwithstanding the corporation did comply with the statute two days after the final approval of the contract by the City Comptroller and before the commencement of the action.

Following this case, the Supreme Court of the State, in *Duluth Music Company vs. Clancy,* 139 Wis. 189, and *Southwestern Slate Company vs. Stephens,* 139 Wis. 616, reaffirmed the doctrine of *Ashland Lumber Co. vs. Detroit Salt Co., supra,* and held *absolutely void* (in their favor) contracts made by foreign corporations in violation of the statute, and further held, in the *Southwestern Slate Company* case, which was a suit to recover the unpaid balance upon a subscription to the capital stock of the plaintiff corporation, that the provisions of sub-section 10 of said Section 1770b were not limited in their operation to contracts made by a corporation which is doing business in the state within the meaning of sub-section 2. Such a construction, the court said, would render superfluous that portion of the statute which invalidates

> "every contract made by or on behalf of any such foreign corporation, affecting the personal liability thereof, or relating to property within this state."

This statement of the court had reference to the contention that inasmuch as the transaction in question was a mere sale of stock, while the corporation properties were located and its business being carried on in another state, the statute did not apply.

Then came the case of *Hanna vs. Kelsey Realty Company*, 145 Wis. 276, decided February 21, 1911, which brought up directly the question of the validity of a deed to a foreign corporation which had not complied with the statute. The plaintiff, being the owner of the land in question, executed a deed thereof to one Johnson, who executed a mortgage back for part of the purchase money. After delivery of the papers, Johnson, upon some pretense, secured possession of the note and mortgage, and then, in violation of his agreement, placed his deed on record and conveyed the premises to a third party without the payment of any consideration, and the latter in turn conveyed to the defendant, a non-complying foreign corporation found by the court to have been a purchaser in good faith, for value. It was contended on the part of the defendant corporation that the statute did not render its deed void, but voidable only at the election of the state, and that the state alone could question the validity of its title and decree a forfeiture. The court over-ruled this contention, saying, page 282:

"No good reason suggests itself why a party who is affected by a foreign corporation doing business or making a contract in the state in violation of the statute, may take advantage of it, while one who is affected by the corporation *acquiring or holding property* may not do so. All these prohibitions occur in the same sentence in the statute and the penalty is precisely the same as to the violation of each of them.

But more convincing is the fact that this court has unequivocally held that the words 'wholly void,' as used in the statute, 'mean just what they say,' and that is 'absolutely void and a nullity.' *Ashland L. Co. vs. Detroit Salt Co., supra.* In adopting such construction, the court followed the decision in *Land L. & L. Co. vs. McIntyre,* 100 Wis. 245, 75 N. W. 964, wherein the word 'void,' as used in Sec. 692, R. S., 1878, was given a like construction. So, unless we overrule our former decisions, it naturally follows that we cannot adopt for our guidance the pronouncements of courts that elect to construe the word 'void' as meaning simply 'voidable' in such a statute It therefore appears that the real question in issue has already been decided, as it would hardly be contended that if the deed to the appellant was 'absolutely void and a mere nullity,' the plaintiff could not show that fact and take the benefit of it. *If its deed was void, the appellant took nothing under it and has no right or title to assert by virtue of such deed.*"

The Court further held that *any person interested* might assert the benefit of the statute, declaring that such had been the uniform holding of the Court in prior cases.

Answering the argument relative to the hardship resulting from the strict construction and enforcement of the statute, the Court said:

> "Drastic and harsh in its penalties it may be, but the legislature undoubtedly knew that cases involving great hardships might arise because of the statute. The state evidently intended to make the consequences of violating the law so great as to enforce obedience to it. It was within the legislative province to prescribe those penalties and this Court cannot soften or mitigate them without violating the law."

The statute was again invoked in the case of *Independent Tug Line vs. Lake Superior L. & B. Co.*, 146 Wis. 121, decided May 2, 1911, which was an action to recover the sum of $1,800 alleged to be due the plaintiff for towing logs on Lake Superior, but within the boundaries of Wisconsin as fixed by the Enabling Act under which it was admitted into the Union. The defendant set up that plaintiff was an unlicensed foreign corporation, and also counter-claimed for damages suffered by its negligent performance of the contract. The jury returned a verdict of $1,500 in favor of the plaintiff, upon which judgment was entered. The Supreme Court on appeal re-affirmed the constitutionality of the statute, cited its previous decisions under it as above enumerated together with the case of *Diamond Glue Company vs. United States Glue Company,* 187 U. S. 611, and reversed the judgment and remanded the case with directions to dismiss the complaint.

It will be seen from the foregoing that the highest court of the state supported therein by the decision of this Court, had consistently, from the time of the enactment of this statute, held *void* all contracts coming within its terms to which a foreign corporation

was a party, whether unilateral or bilateral, precisely as the statute itself declared—that is to say, *"wholly void on its behalf* (referring to the foreign corporation) *and on behalf of its assigns, but enforcible against it or them."*

At this point, in view of the decision in *Hanna vs. Kelsey Realty Company,* declaring void all deeds to foreign corporations before compliance with the provisions of Sec. 1770b, the legislature deemed it best to modify the drastic effect of the statute to the extent of removing the disability of a certain class of foreign corporations which were within the letter of the act because of having taken conveyances of real estate before having complied with the law, but had thereafter and prior to the passage of the act about to be referred to, complied therewith.

Accordingly, on May 12, 1911, Chapter 142, Laws of 1911, was passed, which *created a new section* of the general statutes, thereafter known as Section 1770j. Later in the same session this act was verbally amended by Sec. 12, Ch. 664, Laws of 1911, approved July 15, 1911. Section 1 of this act, as amended, containing the new section thus created, embraces two sub-sections and reads as follows:

> Section 1. There is added to the statutes a new section to read: Section 1770j. 1. Any corporation organized otherwise than under the laws of this state, having acquired, or attempted to acquire, legal title by deed, or lease, to any real property in this state, before complying with the terms of Section 1770b of the Statutes, or acts amendatory thereof, and which has thereafter, and before the passage of this act, complied with said section, shall be and is hereby relieved from

any disability provided in said statute or prohibition therein contained, so far as said section relates to the acquisition and holding of the property so acquired, or attempted to be acquired.

2. Any person claiming that the legal title of any corporation or of any person claiming by, through, or under such corporation, to any real property acquired, or attempted to be acquired, is invalid by reason of the failure of any corporation coming within the terms of sub-section 1 of this section, to comply with Section 1770b of the Statutes, or acts amendatory thereof, shall commence action to recover the property, or to declare the legal title of said corporation void, or interpose a defense on such grounds, within one year from the passage and publication of this ~~act~~ section, and in case of failure to do so, his right of action or defense, based upon the failure to comply with said section by any such corporation, shall be deemed to have expired; provided that this ~~act~~ shall not affect any action now pending

Section 2 merely declared that

> "This act shall take effect and be in force from and after its passage and publication."

Shortly thereafter the case of *Lanz-Owen Co. vs Garage Equipment Manufacturing Company,* 151 Wis. 555, involving the construction and effect of this statute came before the Supreme Court for decision, and counsel for plaintiffs in error contend that in deciding the same, the Supreme Court of the state departed from its earlier decisions and laid down a new rule of property for the state whereby contracts with and conveyances to unlicensed foreign corporations became merely voidable and not void.

In this case, property within the state was leased

by the owner to plaintiff, a foreign corporation, which had not then complied with Section 1770b, Stats., but which thereafter complied before the passage of Section 1770j. After the curative act became effective the corporation sued one who it was alleged unlawfully withheld from it the possession of the leased premises. Within the year limited by Section 1770j, the defense was interposed that the lease to the plaintiff was void because given before the plaintiff had complied with Section 1770b.

That the contention of counsel for plaintiffs in error that this case marked a change in the opinion and the ruling of the Supreme Court was unwarranted, is manifest from the opinion itself in which the earlier authorities cited in this brief are expressly mentioned by title and approved, with the explanation that the use of the term "absolutely void," without limitation, is inaccurate in that they are only *"a nullity so far as it is sought to be enforced on behalf of the foreign corporation,"* even by way of counterclaim in an action in which the same contract is sought to be enforced *against* the corporation.

Referring to *Hanna vs. Kelsey Realty Company,* 145 Wis. 276, the Court said:

> "Language declaring it void without limitation is used, *but the Court was dealing with a case in which a foreign corporation sought to assert the validity of its deed,* and it was held that plaintiff, though not a party to it, but affected by it, could invoke the aid of the statute."

The Court in no way qualified what it had said in respect to a title asserted under such a deed, but in

this latter opinion plainly indicated its continued adherence to the doctrine that such a deed is absolutely void. Indeed, no other conclusion is compatible with the declaration of the statute that a corporation which has not complied with its requirements shall not "acquire, hold, or dispose of property within this state."

The contract, which may be enforced *against,* but not *in favor* of a foreign corporation, as the Court explained in *Catlin and Powell vs. Schuppert,* 130 Wi 642, are bilateral contracts, those containing mutual undertakings, and it was of such a contract that the Court was speaking in the *Lanz-Owen* case. It would not be appropriate to speak of *enforcing a deed* against the grantee, therefore, in so far as a deed is a contract, it is absolutely void if the grantee is incompetent to take.

Having stated the law as it was prior to the enactment in 1911 of Section 1770j, the Court proceeded to consider the effect of that statute and held:

(1) That it did not validate the titles of foreign corporations which, after attempting to acquire title to land before complying with the statute, and prior to the enactment of Section 1770j, had so complied, but merely removed their disability and enacted a one year limitation within which the validity could be attacked.

(2) That the defendant, though not a party to the lease in question and *in no better position than a trespasser* had the right to set up this defense.

(3) That the lease in question was *void* and the action was properly dismissed.

The Court further held that the curative act did not relate back so as to validate prior contracts from the time of their execution, but their invalidity could still be asserted by any person affected thereby, at any time within one year from the time the act went into effect.

It was, in short, a *statute of limitations,* which, when it has run, under the rule in this state, destroys the cause of action and vests the title in the corporation in whose favor it is invoked, which would *then* be competent to take and hold it.

It will be seen that there was neither any change in *policy,* nor any attempted *validation* of the previous void conveyances, even as to this limited class of corporations, but merely a one year limitation placed upon the right to attack such conveyances. Before that act, the Court said, there was *no time limit,* but the point could be raised at any time. It follows that as to corporations not within the terms of the curative statute (namely, those which had not complied with Sec. 1770b before Sec. 1770j was passed) the invalidity can be asserted by any one at any time—unless, of course, he be barred by some other principle of law.

Although counsel for plaintiffs in error have quoted certain passages from the opinion which, standing alone, might be thought inconsistent with the language used in previous decisions, it is very plain, when the opinion is read as a whole, and when the result arrived at is considered, that no departure whatever was intended from the Court's earlier decisions on this

point, nor was any new rule of property laid down or intended.

The State Supreme Court in its opinion in the instant case, expressly states that the conclusion which counsel seeks to draw from the opinion in the *Lanz-Owen* case is unwarranted, and upon this proposition the Court is unanimous. The Court says (Trans. 43):

> "It is claimed that the enactment of Ch. 142, Laws 1911, makes a change in the legislative policy of this state in view of the decision of this Court in *Hanna vs. Kelsey R. Co., supra.* This chapter was considered in *Lanz-Owen & Co. vs. Garage E. M. Co.,* 151 Wis. 555, 139 N. W. 393. We see nothing in the enactment of that chapter to indicate any intention or purpose on the part of the legislature to relieve corporations thereafter transacting business or acquiring property within this state from complying with Sec. 1770b. Had such been the legislative purpose, it could very easily have been stated. On the other hand, the legislature failed to change the terms of Sec. 1770b as interpreted in *Hanna vs. Kelsey R. Co.*, but chose to relieve those who prior thereto had inadvertently, or mistakenly, supposed Sec. 1770b not to be applicable to their particular situation, by the enactment of Ch. 142. This does not indicate a purpose to change the legislative policy of the state, but rather to adhere to it.
>
> "Holding as we do, that the deeds in question were void and not voidable, we need not consider whether or not the *Bank* or *Munday* failed to exercise ordinary care with respect to the ownership of the property in question. It is manifest that the void deeds conveyed no title, the subsequent conveyances of the *Realty Realization Company* to *Walter* conveyed none, and that matter need not be further considered."

Again the Court says (Trans. 45):

> "We think this disposes of the question raised by appellants, and while, as pointed out by the late Justice Timlin, the language used, if considered apart from the text, may form a basis for the claim made, we think that the decisions in *Hanna vs. Kelsey Realty Co., supra,* and *Lanz-Owen Co. vs. Garage Equipment Mfg. Co., supra,* are not inconsistent with the other decisions of this Court, and that it is clear that the contract does not become void or not at the election of the opposite party, *but is void by the terms of the statute, and that the law has been so construed by this Court from the beginning.* To be sure, the opposite party may at his election, enforce it, but so far as it is a contract in favor of, or on behalf of the offending corporation, it is void."

The same statute was the determining factor in *Loomis vs. People's Const. Co.* (C. C. A., 6th Cir.), 211 Fed. 453, and in deciding the same that Court had occasion to consider the *Lanz-Owen* case, and whether or not it indicated a departure by the Supreme Court of Wisconsin from the rule before announced by it, and agreed with the Supreme Court itself that it did not. Accordingly, the contract there in question was pronounced void and recovery thereon denied on that ground, although in large part performed. The Court says:

> "True the Supreme Court of the State in *Lanz Owen & Co. vs. Garage Equipment Co.,* 151 Wis. 555, 139 N. W. 393, decided since the contract in question was made (and, indeed, since the decision of this case below), has said of contracts made before compliance with the statute that they are not 'absolutely void,' but are 'void only at

the election of the party dealing with the corporation,' but that decision again affirms that such contracts are 'wholly void on its (the foreign corporation's) behalf and on behalf of its assigns' and that 'neither the corporation nor its assigns could enforce it against the other party.' We think the expressions contained in this later opinion do not, so far as respects the instant case, change the rule before announced by that Court. Indeed, the right of the *opposite party* to enforce the contract was expressly written in the statute when previously construed by the Wisconsin decisions, as well as in *Diamond Glue Co. vs. U. S. Glue Co.*," 187 U. S. 611, 47 L. Ed. 328.

In the case of *Mortenson vs. Murphy,* 153 Wis. 389, referred to by counsel for plaintiffs in error, there had been a conveyance by the owner of land to an unlicensed foreign corporation, and subsequent conveyances by it to a third party, and a mortgage executed by the latter. The mortgage to whom the first grantor had executed a quit claim deed brought this action to foreclose the mortgage.

The Supreme Court held as follows:

"1. Although a conveyance of land in this state to a foreign corporation, which had not complied with Section 1770b, Stats., *was void,* yet a *grantee* of such corporation who went into possession of the land under his deed, had an interest therein which he would convey or mortgage, to-wit: *Possession under claim and color of title,* which possession might, if continued for a period of ten years, ripen into a title by adverse possession; and the possession of subsequent grantees of the same premises could be tacked to that of each prior grantee in order to make up the statutory period.

2. Where the original grantee of the foreign corporation mortgaged the land and afterwards sold and conveyed it subject to the mortgage, *the right of the mortgagee was superior to that of the purchaser* and whatever interest the latter might have could be foreclosed and sold under the mortgage.

3. The statute of 1911 did not have the effect by its curative provisions, to transfer the title to such foreign corporation immediately, but was in the nature of a statute of limitation and allowed the party dealing with the corporation a year in which to assert his right by action or defense.

4. If he did not do so, he would be barred from thereafter making a claim. *Title was not taken away from the grantor* by the statute, but could be asserted at any time within the period stated. If not so asserted, the corporation in effect got title *at the expiration of the year by force of the statute.*

5. The purpose of the original grantor in quit-claiming to the bank having evidently been to ratify what had been done, and thereby to place the parties in the same position they would have occupied had the corporation been competent to receive and to transfer title in the first instance, such mortgage became a prior and paramount lien and should be foreclosed accordingly."

It will be seen that there was no departure from the ruling in the *Hanna vs. Kelsey* case, but the Court again held the deed to the foreign corporation to be *void,* and that the title remained vested in its grantor notwithstanding its deed until he quit-claimed to the mortgagee four and one-half years afterward.

All subsequent decisions of the Wisconsin Supreme Court have been in line with those already cited, and

without discussing them at length, we merely refer to the following:

Indiana Road Machine Co. vs. Town of Lake, 149 Wis. 541;

Sprout, Waldron & Co. vs. Amery M. Co., 162 Wis. 279;

Phoenix Nursery Co. vs. Trostel, 166 Wis. 215.

The *Lanz-Owen* case could hardly be said to have established a rule of property upon the faith of which plaintiffs in error relied in the transaction in question, for these reasons:

1. It declared void the lease to the foreign corporation, at the suit of a mere trespasser, and without any election by the lessor.

2. It was announced only a little over one month prior to the conveyances to the Realty Realization Company, had probably not been published, and even if known to plaintiffs in error, was not, so far as the record shows, and in the nature of things could not have been, relied upon by them.

3. There is nothing in the record in the case to support the statement of counsel for plaintiffs in error that the bank loaned its money in reliance upon the decision in the *Lanz-Owen* case.

Furthermore, the contention of counsel for plaintiffs in error that their contract rights have been impaired by the statute in question as administered by the Supreme Court of this state, is untenable for two reasons:

First: Because the obligations of a contract cannot be impaired within the meaning of Sec. 10, Art. I, Const. U. S., by a statute in force when the contract was made.

Lehigh Water Co. vs. Easton, 121 U. S. 388;
Diamond Glue Co. vs. U. S. Glue Co., 187 U. S. 611, 615;
Pinney vs. Neilson, 183 U. S. 144, 147;
Skaneateles W. W. Co. vs. Skaneateles, 184 U. S. 367;
Chicago & Alton R. Co. vs. McWhirt, 243 U. S. 422;
Bacon vs. Texas, 163 U. S. 207;
New Orleans W. W. Co. vs. Louisville S. R Co., 125 U. S. 18.

Second: In the case of *Central Land Co. vs. Laidley,* 159 U. S. 103, where the question upon the merits was whether the decision of the Supreme Court of Appeals of West Virginia, declaring void a married woman's deed because not executed in conformity with the state law, was at variance with its own earlier decisions and those of the highest court of Virginia before the creation of West Virginia—it was *held* that the appellate jurisdiction of the Supreme Court of the United States, upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can only be invoked against a subsequent act of the legislature, and not against a mere change of judicial decision, nor because a valid statute of the state, existing when the contract was made, has been

misconstrued by the Court, and the writ was dismissed for want of jurisdiction.

In the last cited case the Court distinguishes the rule applicable where the Federal Supreme Court is called upon to review a decision of the highest court of a state, from that applicable in cases coming up from a court of the United States where the whole case is brought up, including the question how far the courts of the United States should follow the decisions of the highest court of the state; and illustrates the difference by two cases involving a construction of the Constitution of the State of Iowa, one coming from the U. S. District Court of that state, and the other on Writ of Error to the Supreme Court, wherein directly opposite results were reached.

Gelpeke vs. Dubuque, 68 U. S. (1 Wall), 175;
Miss. & Mo. R. Co. vs. McClure, 77 U. S. (10 Wall), 511.

The rule announced in *Central Land Co. vs. Laidley, supra,* that the contract clause of the Constitution is not addressed to such impairment as may arise by mere *judicial decisions* in the state courts without *action by the legislature,* even though such courts may have changed their decisions, is now well settled in this Court.

Bacon vs. Texas, 163 U. S. 207;
New Orleans W. W. Co. vs. Louisville S. R. Co., 125 U. S. 18;
Mobile Trans. Co. vs. Mobile, 187 U. S. 488;
Weber vs. Reagan, 188 U. S. 14;

Nat. Mut. Bldg. & L. Assn. vs. Brahan, 193 U. S. 647;
Cross Lake S. Club vs. Louisiana, 224 U. S. 639;
Ross vs. Oregon, 227 U. S. 150, 161;
Moore-Mansfield Co. vs. Elec. Inst. Co., 234 U. S. 619;
Frank vs. Mangum, 237 U. S. 309, 344;
Cleveland & P. R. Co. vs. Ohio, 235 U. S. 50;
O'Neil vs. Nor. Cal. Irr. Co., 242 U. S. 20.

Said Mr. Justice Peckham, speaking for the Court in *Bacon vs. Texas, supra*, concerning this point:

> "The construction of the general law which had been thus given by the courts upon the question of what was a sufficient survey, it is claimed, had become a rule of property which parties were entitled to rely upon, and which no court could overturn, and if it did so, a contract was impaired, and the judgment was reviewable by this Court. The proposition cannot be maintained as a basis for giving this Court jurisdiction upon writ of error to the state court. It ignores the limits to our jurisdiction in this regard, which, as has been seen, is confined to legislation which impairs the obligation of a contract.
>
> The argument involves the claim that jurisdiction exists in this Court to review a judgment of a state court on writ of error when such jurisdiction is based upon an alleged impairment of a contract by reason of the alteration by a state court of a construction theretofore given by it to such contract or to a particular statute or series of statutes in existence when the contract was entered into. Such a foundation for our jurisdiction does not exist."

Again, in *Turner vs. Commissioners*, 173 U. S. 461, where it was claimed that the Supreme Court of the state had decided before the bonds in question were issued, that the acts under which they were issued were valid, and that in holding the contrary after the bonds were issued, that court had impaired the obligation of the contract, this court said:

> "But in this case we have no power to examine the correctness of the decision of the Supreme Court of North Carolina, because, this being a writ of error to a state court, we cannot take jurisdiction under the allegation that a contract has been impaired by a decision of that court, when it appears that the state court has done nothing more than construe its own constitution and statutes existing at the time when the bonds were issued, there being no subsequent legislation touching the subject. We are therefore bound by the decision of the state court in regard to the meaning of the constitution and laws of its own state, and its decision upon such a state of facts raises no Federal question. Other principles obtain when the writ of error is to a Federal Court."

In *Nat. Mut. B. & L. Assn. vs. Brahan*, 193 U. S. 647, the Court by Mr. Justice McKenna said:

> "Where the federal question upon which the jurisdiction of this Court is based, grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the constitution, so as to give this Court jurisdiction on writ of error to a state court, by some subsequent statute of the state which has been upheld or effect given it by the state court.
>
> In the case at bar there was no subsequent stat-

ute. There was a change in decision, it is contended, but against a change of decision merely, Sec. 10, Article 1, cannot be invoked."

In *Cross Lake Shooting Club vs. Louisiana,* 224 U. S. 639, Mr. Justice Van Devanter, writing the opinion, said:

> "When the state court, either expressly or by necessary implication, gives effect to a subsequent law of the state, whereby the obligation of the contract is alleged to be impaired, a federal question is presented.
>
> But if there be no such law, or if no effect be given to it by the state court, we cannot take jurisdiction, no matter how earnestly it may be insisted that that court erred in its conclusion respecting the validity or effect of the contract; and this is true even where it is asserted, as it is here, that the judgment is not in accord with prior decisions on the faith of which the rights in question were acquired."

So, in *Moore-Mansfield Const. Co. vs. Elec. Inst. Co.,* 234 U. S. 619, 624, involving the question of the right to a mechanic's lien against railroad property, Mr. Justice Lurton said:

> "It has many times decided that a writ of error will not lie from this Court to a state court, under Sec. 709, R. S., on the ground that the obligation of a contract has been impaired by a change in the decision of the state court in respect to the meaning and scope of a statute the validity of which has not been denied."

And in *Cleveland & P. R. Co. vs. Cleveland,* 235 U. S. 50, where the federal right set up concerned an alleged change of decision by the Supreme Court of

Ohio construing a statute under which the railroad company claimed contract rights, thereby doing violence to the contract clause of the constitution, Mr. Justice Day, in a memorandum opinion, said:

> "It is equally well settled that an impairment of the obligation of a contract within the meaning of the Federal Constitution must be by subsequent legislation and no mere change in judicial decision will amount to such deprivation."

II.

B

Section 1770b, and more particularly sub-section 10 thereof, as administered and enforced in the case at bar, so as to render void the contract and deeds delivered in Illinois, does not violate the "due process clause of the Fourteenth Amendment of the Constitution of the United States."

The contention of counsel for plaintiffs in error under their Second Assignment of Error, namely, that because the contract and deeds to Realty Realization Company were delivered in the State of Illinois, and because the Supreme Court of the State of Wisconsin by its decision refuses to give them effect, therefore Section 1770b, as administered and enforced in this case, violated the due process clause of the constitution, proceeds upon one or both of two erroneous propositions, viz.:

(1) That the state had no power to impose conditions upon corporations of other states seeking to acquire land within the state; or

(2) That the laws of a state governing the ownership and the transfer of title to real estate therein may be disregarded, provided only that the instrument evidencing the transaction was executed outside of the state.

With reference to the first proposition, it is clear that the acquiring and holding of land by a corporation, within a state other than that of its incorporation, is an exercise within such state of its corporate functions and franchise, and the right of one state to exclude entirely corporations of other states, or to impose conditions upon their right to exercise their corporate powers within the state is thoroughly well settled.

Not only was the validity of Section 1770b, Wis. Stats., which forbids foreign corporations to acquire, hold, or convey land within the state until they have complied with said section, directly passed upon and sustained by this Court in *Diamond Glue Company vs. United States Glue Company,* already cited, but the general principle above stated, that every state has the right, without infringement of any constitutional guaranty to impose such conditions as they choose (with certain limitations not here in question) upon the exercise by corporations of other states of their corporate functions, such as the transaction of business and the acquisition of property within the state, has been repeatedly affirmed by this Court.

Hooper vs. Cal., 155 U. S. 648, and cases collected in opinion of Mr. Justice White at p. 652;

Chattanooga N. B. & L. Assn. vs. Denson, 189 U. S. 408;

National Mut. B. & L. Assn. vs. Brahan, 193 U. S. 647;

Baltic Mining Co. vs. Mass., 231 U. S. 68, 83;

South Carolina vs. McMaster, 237 U. S. 63;

Interstate Am. Co. vs. Albert, 239 U. S. 560, 568.

And whether or not a corporate contract entered into in contravention of a statute regulating foreign corporations was, under the proper construction of such statute, *ipso facto* void, and therefore unenforceable in the courts of another state, does not present a federal question under the full faith and credit clause of the United States Constitution, which will sustain a writ of error from the Supreme Court.

Allen vs. Alleghany Co., 196 U. S. 458, 49 L. Ed. 551;

Lloyd vs. Matthews, 155 U. S. 222, 39 L. Ed. 128.

So, if the state statute renders contracts by foreign corporations within its operation void, no action can be maintained on them in a Federal Court, though sitting in another state.

Diamond Glue Co. vs. U. S. Glue Co., 187 U. S. 611;

McCanna & Fraser Co. vs. Citizen's T. & S. Co., 76 Fed. 420;

Cyclone Min. Co. vs. Baker Lt. & Power Co., 165 Fed. 996;

Pittsburg Const. Co. vs. West Side Belt R. Co., (C. C. A.) 11 L. R. A. (N. S.) 1145, 154 Fed. 929;

Chattanooga N. B. L. Assn. vs. Denson, 189 U. S. 408, 47 L. Ed. 870;

Cooper Mfg. Co. vs. Ferguson, 113 U. S. 727, 28 L. Ed. 1137.

Having the constitutional right to impose the conditions it has imposed on the conduct of business or the acquisition of property within the State of Wisconsin, it logically follows that the state had the right to declare that every contract made by any foreign corporation relating to property within this state before it shall have complied with the provisions of this section shall be wholly void.

The highest court of a state having held that an act in the exercise of corporate functions is forbidden to foreign corporations which have not complied with the constitution or statute of the state as to admission, and that the contracts thence resulting are illegal and cannot be enforced in the courts, the Federal Court should follow it.

Chattanooga B. L. A. vs. Denson, 189 U. S. 408;

Diamond Glue Co. vs. U. S. Glue Co., 187 U. S. 611.

As to the second proposition, it is quite well settled that all contracts and deeds for the sale and convey-

ance of land are local and belong to the jurisdiction where the land lies, and will not be enforced when they are in violation of the laws and settled policy of the state.

So held of a deed made in South Carolina of lands located in North Carolina, void under the laws of the latter state because the wife was not privily examined, but not void where executed, and which contained covenants of warranty claimed to be personal and valid and enforceable under the laws of South Carolina; the Court citing:

Story Conflict of Laws, Eighth Ed. 38, 474 Note a;
Wharton Conflict of Laws, Sec. 278, 305, 331;
Meroney vs. Atlantic Bldg. & L. Assn., 116 N. C. 882, 21 S. E. 924;
Armstrong vs. Best, 112 N. C. 59; 17 S. E. 14;
The Kensington, 183 U. S. 263; 45 L. Ed. 190.

Contracts relating to the transfer of lands or the creation of an interest therein or incumbrance thereon must be governed by the law of the place where the land is situated.

Fisher vs. Otis, 3 Penn. 78;
Bissell vs. Terry, 68 Ill. 184, 190;
Fuss vs. Fuss, 24 Wis. 256; 39 Cyc. 1182;
Miller vs. Wilson, 146 Ill. 523.

The rule applies in determining the *capacity* of parties to contract with reference to, or convey, real

estate. Thus, quoting from 22 Am. & Eng. Ency. of Law, p. 1336:

> "The capacity of a married woman, or an infant, to convey, encumber, or contract generally with reference to real estate, is to be determined by the law of the place where the property is situated."

To the same effect are the following:

Story on Conflict of Laws, Secs. 373, 424, 431;

Rorer on Interstate Law, 263;

1 *Devlin on Deeds*, Sec. 65; 32 Cyc. 674.

We quote from *Story* (Sec. 373):

> "But whatever may be the true rule in cases where the law of the *situs* does not prohibit the contract, as, for instance, a contract for the sale of land, it is very clear that, if prohibited there, it is everywhere invalid to all intents and purposes."

Sec. 431:

> "So, if a person is incapable, from any other circumstance, of transferring his immovable property by the law of the *situs*, his transfer will be held invalid, although by the law of his domicil no such personal incapacity exists. On the other hand, if he has capacity to transfer by the law of the *situs*, he may make a valid title, notwithstanding an incapacity may attach to him by the law of his domicil. *This is the silent but irresistible result of the principle adopted by the common law, which has no admitted exception.* We may illustrate the principle by an application to cases of common occurrence under the dominion of the common law. By that law a

person is deemed a minor, and is incapable of conveying real estate, until he has arrived at twenty-one years of age. But by the law of some foreign countries minority continues until twenty-five or even until thirty years of age. Let us then suppose a foreigner owning lands in England or America (where the common law prevails) who is by the law of his domicil in his minority, but who is over twenty-one years of age. It is clear that he may convey his real estate in England or America, notwithstanding such domestic incapacity; for he is of the age required by the local law. On the other hand, let us suppose a married woman who is domiciled in a foreign country and by the law of that country is capable of alienating her real estate without the consent of her husband, owning real estate in England or America, where she is incapable of alienating it without such consent;—she cannot alienate it without the consent of her husband; and her separate act will be held *ipso facto* void by the law of the situs."

Devlin on Deeds, Sec. 65:

"The transfer and acquisition of title to land is governed by the law prevailing in the place where the land is situated. The capacity of the person to take land is determined and controlled by the law of the *situs*. If an alien is not permitted to hold land by the laws of the country where it lies, it is immaterial what the law of his domicil may be upon the subject. It is a principle too firmly established to admit of dispute at this day, that to the law of the state in which land is situated must we look for the rules which govern its descent, alienation and transfer, and for the effect and construction of conveyances."

This is followed by a quotation of the above paragraph from *Story*.

We also quote from *Cyc.* vol. 32, p. 674:

> "It is a principle firmly established that the law of the state wherein real estate is situated (*lex loci rei sitae*) controls and governs its descent and alienation;—the construction, validity and effect of wills and other conveyances thereof; and the capacity of the parties to such contracts or conveyances, and their rights thereunder. This rule is *without exception*, and it is not in the power of any state, by any legislative act, to prescribe the mode in which lands in another state may be disposed of or title thereto passed from one person to another."

As will appear by reference to the above authorities, a person competent to take or convey real estate by the law of the state where it is situated, may take title to, or make a valid conveyance of, such real estate, although in the state of his domicil, or where the conveyance is executed, he would be incompetent, and *vice versa*. An interesting instance which illustrates this proposition is the case of minors whose capacity to convey land is dependent on the age of majority fixed by the *lex rei sitae*, and not by the *lex domicilii*, or the *lex loci contractus*. The same is true with respect to the right of a *feme covert* to convey without the consent of her husband.

The Supreme Court of Illinois, in a well considered opinion, treating a phase of this question having to do with the right of non-resident alien heirs to acquire the title to real estate in that state, said:

> "It is a general rule of the common law that *the title to real property must be acquired and passed according to the lex rei sitae*. This rule

not only applies to alienations and acquisitions made by the acts of the parties, but also to estates and rights acquired by operation of law. The descent and heirship of real estate are governed by the law of the country where it is located. * * * This principle, originally applicable as between countries entirely foreign to each other, also prevails as among the states of the American Union. From it results the doctrine that the title of aliens to land within the limits of the several states is matter of state regulation," quoting

2 *Whart. Int. Law Dig.* 490, to the effect that

"the right of foreigners to hold title to real estate is entirely *dependent on the laws of the state in which the land is situate.*"

Wunderle vs. Wunderle, 144 Ill. 40, 33 N. E. 195.

It was accordingly *held*, that under a statute of that state declaring that non-resident aliens should not be capable of "acquiring title to, taking or holding any lands or real estate within this state by descent, devise, purchase or otherwise" (substantially the wording of our statute as to foreign corporations) a non-resident alien heir of a deceased owner of land in Illinois took no title thereto but the entire estate went to the next of kin competent to take under the law of Illinois. This case is cited and approved in *Hanna vs. Kelsey,* 145 Wis., *supra.*

But the rule is not without exception even as to personal contracts. Such a contract, if void as against the public policy of the state, declared in judicial de-

cisions and by statute, will not be enforced in that state, though valid in the state where made and where it is to be performed.

Fox vs. Telegraph Co., 138 Wis. 648.

This, with other exceptions to the general rule governing purely personal contracts, is clearly stated in *Cyc.*, as follows:

> "The general doctrine that a contract valid where made, is valid also in the courts of any other country or state where it is sought to be enforced, even though had it been made in the latter country or state, it would be illegal and hence unenforceable, is subject to several exceptions: (1) Where the contract in question is contrary to good morals; (2) where the state of the forum or its citizens would be injured through the enforcement by its courts of contracts of the kind in question; (3) where the contract violates the positive legislation of the state of the forum, that is, is contrary to its constitution or statutes; and (4) where the contract violates the public policy of the state of the forum."
>
> 9 *Cyc.* 674, *Title "Contracts"* XI. B. 9 b and note 49.

Story in his *"Conflict of Laws,"* Sec. 424, says:

> "The general principle of the common law is, that the laws of the place where such property is situate, *exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them.*"

And in Sec. 428, the same author says:

> "The consent of the tribunals acting under the common law, both in England and America is in

> *a practical sense absolutely uniform on the same subject.* All the authorities, in both countries, so far as they go, recognize the principle in its fullest import, that *real estate, or immovable property, is exclusively subject to the laws of the government within whose territory it is situate.*"

Continuing, he writes, at Sec. 430:

> "First in relation to the capacity of persons to take or transfer real estate. It may be laid down as a general principle of the common law, that a party must have a capacity to take according to the law of the *situs*, otherwise, he will be excluded from all ownership."

And the Supreme Court of the United States, in *United States vs. Crosby,* 7 Cranch 114, per Mr. Justice Story, used this language:

> "The court entertain no doubt on the subject; and are clearly of the opinion that the title to land can be acquired and lost only in the manner prescribed by the law of the place where the land is situate."

The State of Wisconsin having by statutory enactment, as construed by its highest court, declared that no corporation, such as the Realty Realization Company, should transact business or acquire, hold, or dispose of property in that state until it had first complied with certain conditions lawfully prescribed, and furthermore that every contract made by such corporation relating to property within that state before it should have complied with such conditions, shall be void, which the highest court of that state held to mean that it should be absolutely void and convey no title whatsoever, it follows that the Realty Realiza-

tion Company having failed to acquire any right to the property in question, the plaintiffs in error, claiming through the Realty Realization Company, likewise failed to acquire any right thereto, and so have never been deprived of any property. Certainly, the plaintiffs in error cannot have been deprived of property in which they never acquired any interest; and so it follows that assignments of error based on alleged contraventions of the due process clause of the Fourteenth Amendment are not well taken.

It is probably superfluous to add that no mere error of the Supreme Court of the state in interpreting or applying the law of the state (if such there should be) can avail the plaintiffs in error here; for this Court has often recognized the limitation upon its jurisdiction stated by Mr. Justice Gray in *Central Land Co. vs. Laidley*, 159 U. S. 103, 112, in these words:

> "When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law within the Fourteenth Amendment of the Constitution of the United States;" citing
>
> *Walker vs. Sauvinet*, 92 U. S. 90;
> *Head vs. Amoskeog Mfg. Co.*, 113 U. S. 9, 26;
> *Marley vs. L. S. & M. S. R. Co.*, 146 U. S. 162, 171;
> *Bergmann vs. Backer*, 157 U. S. 655.

It has also declared:

> "We are not authorized by the Judiciary Act to review the judgments of the state courts be-

cause their judgments refuse to give effect to valid contracts or because those judgments in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, when the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held."

Mr. Justice Miller in

Knox vs. Exchange Bank, 79 U. S. (12 Wall) 379, 383.

C.

The amendatory act of 1917, as construed by the Supreme Court of Wisconsin, had no application to foreign corporations such as the Realty Realization Company; and according to such construction there was no deprivation of property without due process of law. That construction is binding upon the Supreme Court of the United States.

The third proposition of plaintiffs in error is that the judgment of the Supreme Court of Wisconsin in declaring the deeds void and in refusing to give them efficacy notwithstanding the validating statute of 1917, deprived plaintiffs in error of their property without due process of law in violation of the Fourteenth Amendment.

The judgment of the Supreme Court of Wisconsin, as will appear from an examination of the opinion of that court (Trans. 33) is predicated in part upon its construction of the validating statute of 1917, and as construed by that court the legislature by the enactment of Ch. 211, laws 1917, intended only to exempt

from the provisions of 1770b "corporations not organized or conducted for profit" and to confirm and validate titles theretofore attempted to be acquired by the exempted corporations. As so construed, the act in question can have no application to the Realty Realization Company, which was not within the exempted class of corporations, and there is no claim on the part of plaintiffs in error that it was a corporation "not organized or conducted for profit."

The contention of plaintiffs in error under their third assignment of error is in substance and effect that the state court erred in its construction of a local statute, and this presents no federal question, for

It is a well settled rule that the Supreme Court of the United States, in cases involving the application of state statutes, will be governed by the interpretation of such statutes placed thereon by the highest tribunal of the state, which is regarded as a part of the statute.

Leffingwell vs. Warren, 2 Black 599;
Stone vs. Wisconsin, 94 U. S. 181.

The proper construction of state legislation being a question of local and not of Federal law, the decision of a state court thereon is not subject to review by the Federal Supreme Court on writ of error to that court.

Great West. Tel. Co. vs. Purdy, 162 U. S. 329, 40 L. Ed. 986;
Lombard vs. W. Chicago Park, 181 U. S. 33, 45 L. Ed. 731;
Harrison vs. Myers, 92 U. S. 111, 23 L. Ed. 606;

Stryker vs. Goodnow, 123 U. S. 527, 31 L. Ed. 194;

Missouri ex rel. vs. Dockery, 191 U. S. 165, 63 L. Ed. 571 (annotated);

Gulf, Etc., R. Co. vs. Hewes, 183 U. S. 66, 46 L. Ed. 86.

And this principle controls although the Supreme Court of the United States may doubt the correctness of the state court's construction, and may have already accepted and adopted a different construction of similar legislation of another state, in deference to the highest court of that state.

Carroll County vs. Reynolds, 18 Wall. 71;

Erie R. Co. vs. Penn., 21 Wall. 492, 22 L. Ed. 595;

Union Nat. Bank vs. Bank of Kan. City, 136 U. S. 223.

The construction of a state law by its highest court upon a question affecting the title to real property in the state is accepted as binding by the Federal Supreme Court.

Williams vs. Kirtland, 13 Wall. 306, 20 L. Ed. 683;

Barrett vs. Holmes, 102 U. S. 651, 26 L. Ed. 292;

McArthur vs. Scott, 113 U. S. 391, 28 L. Ed. 1031;

Polk vs. Wendell, 9 Cranch 87, 3 L. Ed. 665;

Slaughter vs. Glenn, 98 U. S. 242, 25 L. Ed. 122.

And the same rule applies as to the validity (under the State Constitution), construction and effect of statutes in relation to foreign corporations.

Noble vs. Mitchell, 164 U. S. 367, 41 L. Ed. 472;

N. Y. Life Ins. Co. vs. Cravens, 178 U. S. 389, 44 L. Ed. 1116;

Chat. Nat. B. & L. Ass'n vs. Denson, 189 U. S. 408, 47 L. Ed. 870;

Nat. M. B. & L. Ass'n vs. Brahan, 193 U. S. 635, 48 L. Ed. 823;

Stone vs. So. Ill. & M. B. Co., 206 U. S. 267, 51 L. Ed. 1057;

Pittsburg Const. Co. vs. West End Belt R. Co. (C. C. A.), 154 Fed. 929, 11 L. R. A. (N. S.) 1145.

The construction by a state court of the constitution or statutes of the state is conclusive on the Supreme Court of the United States.

Arkansas S. R. Co. vs. La. A. R. Co., 218 U. S. 431, 54 L. Ed. 1097;

Standard Oil Co vs. Missouri, 224 U. S. 270, 56 L. Ed. 760;

Maiorand vs. B. & O. R. Co., 213 U. S. 268, 53 L. Ed. 792;

Watson vs. Maryland, 218 U. S. 173, 54 L. Ed. 987;

Collins vs. Texas, 223 U. S. 288, 56 L. Ed. 439;

Cons. Rend Co. vs. Vermont, 207 U. S. 541, 52 L. Ed. 327;

U. S. Express Co. vs. Minnesota, 223 U. S. 335, 56 L. Ed. 459;

Martin vs. West, 222 U. S. 191, 36 L. R. A. (N. S.) 592;

Welch vs. Swasey, 214 U. S. 91, 53 L. Ed. 923;

Kryger vs. Wilson, 242 U. S. 171, 61 L. Ed. 229;

Cusack Co. vs. Chicago, 242 U. S. 526, 61 L. Ed. 472;

Reiman vs. Little Rock, 237 U. S. 171, 59 L. Ed. 900;

Int. Harvester Co. vs. Kentucky, 234 U. S. 216, 58 L. Ed. 1284;

C. M. & St. P. R. Co. vs. Iowa, 233 U. S. 334, 58 L. Ed. 988;

Clement Nat. Bank vs. Vermont, 231 U. S. 120, 58 L. Ed. 147;

At. Coast L. Co. vs. Goldsboro, 232 U. S. 548, 58 L. Ed. 721.

Even when the question involved, on a writ of error from the Federal Supreme Court to a state court, is the conformity of state legislation to the Federal Constitution, the construction placed upon such legislation by the highest state court must be accepted by the Supreme Court of the United States.

Lane County vs. Oregon, 7 Wall., 71, 19 L. Ed. 101;

C., M. & St. P. R. Co. vs. Minnesota, 134 U. S. 418, 33 L. Ed. 970;

Pullman's Pal. Car Co. vs. Penn., 141 U. S. 18, 35 L. Ed. 613;

Morley vs. L. S. & M. S. R. Co., 146 U. S. 162, 36 L. Ed. 1043;

N. Y., L. E. & W. R. Co. vs. Penn., 158 U. S. 431, 39 L. Ed. 925;

Mo. Pac. R. Co. vs. Nebraska, 164 U. S. 403, 41 L. Ed. 489;

Osborne vs. Florida, 164 U. S. 650, 41 L. Ed. 586;

First Nat. Bank vs. Chehalls Co., 166 U. S. 440, 41 L. Ed. 1069;

Nobles vs. Georgia, 168 U. S. 398, 42 L. Ed. 515;

N. Y. Life Ins. Co. vs. Cravens, 178 U. S. 389, 44 L. Ed. 1116;

Coml. Natl. Bank vs. Chambers, 182 U. S. 556, 45 L. Ed. 1227;

Orr vs. Gilman, 183 U. S. 278, 46 L. Ed. 196;

Manley vs. Park, 187 U. S. 547, 47 L. Ed. 296;

Hibben vs. Smith, 191 U. S. 310, 48 L. Ed. 195;

Gasquet vs. La Peyre, 242 U. S. 367, 51 L. Ed. 367;

Enterprise Irr. Dist. vs. F. M. Canal Co., 243 U. S. 157, 61 L. Ed. 644;

Cusack Co. vs. Chicago, 242 U. S. 526, 61 L. Ed. 472.

D

The Supreme Court of Wisconsin correctly construed the Act of May 11, 1917, amending sub-section 2 of Section 1770b and subsection 1 of Section 1770j, in holding that it applied only to corporations not organized or conducted for profit, and did not operate to validate the title of Realty Realization Company to the property in question.

The fourth proposition of plaintiffs in error is that the legislature of Wisconsin by the passage of the Amendatory Act of May 11, 1917, amending *inter alia* sub-section 1 of Section 1770j of the Act of May 10, 1913, confirmed the title of the Realty Company, its grantee and successors in title and absolutely and unconditionally validated the title theretofore attempted to be granted by the Trust Company and Robinson.

This same proposition was argued at length in the lower court. That court considered the question fully as will appear by reference to its opinion (Trans. 39), and after mature consideration the conclusion was reached, for the reasons therein stated, that by the act in question, Ch. 211, Laws 1917, the legislature intended only to exempt from the provisions of Section 1770b "corporations not organized or conducted for profit" and to confirm and validate titles theretofore attempted to be acquired by the exempted corporations, of which the Realty Realization Company was *not* one.

The question was reargued at length on a motion for rehearing, after which the Court declined to change its views. (See opinion of court on motion for rehearing, Rosenberry, J., Trans. 55.)

While we repeat under this head what we have hereinbefore argued, that the proper construction of this act is for the Supreme Court of the state, being a question of local and not of federal law, and therefore the decision of the state court thereon is not subject to review in this Court, we shall proceed to show that the lower court correctly construed the Act of May 11, 1917, not to apply to the Realty Company nor validated its title to the property in question.

It would be difficult to discuss this proposition satisfactorily to a court unfamiliar with recent state legislation in Wisconsin, without entering into an explanation of the legislative system and practice which have been for some years past in vogue in the state, and this we will first endeavor to do.

The legislative sessions are biennial and after each session a volume of laws is issued embracing only the acts of the legislature passed at that session, which volume is known as the "laws" of the particular year in which it is issued.

When an existing statute is amended, it is customary, in these volumes of session laws, to indicate in the text the place where parts of the old statute are omitted, if any, by the insertion of asterisks * * * and to indicate changes in or additions to the text by italicizing the new portions.

If a new subject is treated it is usually by the method of creating a new section and giving it a number, or a number and letter combined, which will indicate the position it should take in the next general compilation of the statutes, after which it is known and referred to as "Sec. ——— of the Wisconsin Statutes."

As soon as practicable after the close of the legis-

lative session and the publication of the "Laws" of that year, a compilation is made of the entire statutory law of the state, including in their proper places the laws enacted at that session, stripped of captions, enacting clauses and other formal parts. Thus there is effected a complete revision of the statutes every two years. This general compilation of the statutory law is denominated the "Wisconsin Statutes" with, if desired, a designation of the year in which compiled.

There is a state officer known as the Reviser of Statutes who has charge of this work of compilation, and who also exercises general supervision over legislation to correct verbal errors and aid the legislature in its labors with a view to harmonize the laws and avoid ambiguities and conflicts.

With this prefatory statement, we will proceed to consider the history and purpose of the statute in question, and in doing so shall take the liberty of reproducing, at the expense of some repetition, the several statutory enactments in the order of their adoption.

As was stated by the Supreme Court of Wisconsin in its opinion in the instant case (Trans. 43), the original Section 1770j was enacted within a very short time after the decision of *Hanna vs. Kelsey Realty Company* to "relieve those corporations who prior thereto had inadvertently or mistakenly supposed Section 1770b not to be applicable to their particular situation," namely, those which had complied with the state law (Sec. 1770b) but had failed to realize the

necessity of doing this *before* taking conveyances of real estate.

As already stated, the Act as originally written (Ch. 142, Laws of 1911) was verbally amended at the same session of the legislature (by Sec. 12, Ch. 664, Laws of 1911) by changing the words "this act" in two places where tney occurred in the text of Ch. 142, to "this section," so that said act as so amended read:

"CHAPTER 142.

AN ACT to create Section 1770j of the statutes, relating to titles to real property acquired by foreign corporations before being admitted to do business pursuant to Section 1770b of the statutes.

The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

Section 1. There is added to the statutes a new section to read: Section 1770j. 1. Any corporation organized otherwise than under the laws of this state, having acquired, or attempted to acquire, legal title by deed, or lease to any real property in this state, before complying with the terms of Section 1770b of the statutes, or acts amendatory thereof, and which has thereafter, and before the passage of this act, complied with said section, shall be and is hereby relieved from any disability provided in said statute or prohibition therein contained, so far as said section relates to the acquisition and holding of the property so acquired, or attempted to be acquired.

2. Any person claiming that the legal title of any corporation or of any person claiming by, through, or under such corporation, to any real property acquired, or attempted to be acquired, is invalid by reason of the failure of any corporation coming within the terms of sub-section 1 of

this section to comply with Section 1770b of the statutes, or acts amendatory thereof, shall commence action to recover the property, or to declare the legal title of said corporation void, or interpose a defense on such grounds, within one year from the passage and publication of this act, and in case of failure to do so, his right of action or defense, based upon the failure to comply with said section by any such corporation, shall be deemed to have expired; provided that this ~~act~~ shall not affect any action now pending.

Section 2. This act shall take effect and be in force from and after its passage and publication

Approved May 12, 1911."

At this point we should again call attention to the fact that counsel for plaintiffs in error in printing the foregoing chapter in their brief, at page 37, overlooked the amendment of July 15, 1911, which struck out the word "act" where it appears in the fourth and tenth lines of sub-section 2, of Ch. 142, Laws 1911, as engrossed, and inserted in lieu thereof, the word "section."

Accordingly, sub-section 2, as printed at page 37 of the brief of plaintiffs in error, is erroneous in this, that the words "this act," where it appears twice in said sub-section, should read "this section." When so corrected, much that counsel have to say in their brief at pp. 41, 42 and top of 43, with reference to the supposed effect of the amendment of 1913, has no application and is without point.

Section 1770j was again amended by Ch. 212, Laws 1913, as follows (The portions stricken out being indicated thus * * *, and the new matter indicated in italics):

"CHAPTER 212.

AN ACT to amend Section 1770j of the statutes, relating to titles to real property acquired by foreign corporations before being admitted to do business pursuant to Section 1770b of the statutes.

The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

Section 1. Section 1770j of the statutes is amended to read: Section 1770j. 1. Any corporation organized otherwise than under the laws of this state, having acquired, or attempted to acquire, legal title by deed, or lease, to any real property in this state, before complying with the terms of Section 1770b of the statutes, * * * and which has thereafter, and before the passage of this * * * *section*, complied with said section, shall be and is hereby relieved from any disability provided in said statute or prohibition therein contained, so far as said section relates to the acquisition and holding of the property so acquired, or attempted to be acquired, *and the title so acquired, or attempted to be acquired, is hereby confirmed.*

2. Any person claiming that the legal title of any corporation, or of any person claiming by, through, or under such corporation, to any real property acquired, or attempted to be acquired, is invalid by reason of the failure of any corporation coming within the terms of sub-section 1 of this section, to comply with Section 1770b of the statutes, * * * shall commence action to recover the property, or to declare the legal title of said corporation void, or interpose a defense on such grounds, within one year from the passage and publication of this * * * *section*, and in case of failure to do so, his right of action or defense, based upon the failure to comply with said section by any such corporation, shall be deemed to have expired; provided that

this *sub*-section shall not affect any action now pending.

Section 2. This act shall take effect upon passage and publication.

Approved May 10, 1913."

Said section as thus amended by the Act of 1913 took its place in the Wisconsin Statutes of 1913 as Section 1770j.

Sections 1770b, sub-section 2 and Section 1770j, sub-section 1, were amended by Ch. 211, Laws 1917, as follows (the new matter being indicated in italics):

"CHAPTER 211.

AN ACT to amend sub-section 2 of Section 1770b and sub-section 1 of Section 1770j of the statutes, relating to the filing of articles of incorporation by foreign corporations.

The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

Section 1. Sub-section 2 of Section 1770b and sub-section 1 of Section 1770j of the statutes are amended to read: (Section 1770b) 2. No corporation, incorporated or organized otherwise than under the laws of this state, except railroad corporations, corporations or associations created solely for religious or charitable purposes, insurance companies and fraternal or beneficiary corporations, societies, orders and associations furnishing life or casualty insurance or indemnity upon the mutual or assessment plan, *or corporations not organized or conducted for profit*, shall transact business or acquire, hold, or dispose of property in this state until such corporation shall have caused to be filed in the office of the Secretary of State a copy of its charter, articles of association or incorporation and all

amendments thereto, duly certified by the Secretary of State of the state wherein the corporation was organized (here follows immaterial matter omitted) and provided, further, that except as regards the advancing and loaning of money and the taking, acquiring, holding and enforcing of securities, as above provided, nothing herein contained shall be construed as authorizing any foreign corporation to transact in this state the business of a bank or trust company, or otherwise to exempt any foreign corporation (other than the railroad, religious, charitable, and insurance corporations and *corporations not organized or conducted for profit* above specified) from the provisions of this section or other statutes of this state. Nothing in this section contained shall affect the rights of parties in any action which may now be pending.

(Section 1770j) 1. Any corporation organized otherwise than under the laws of this state, having acquired, or attempted to acquire, legal title by deed, or lease to any real property in this state, before complying with the terms of Section 1770b of the statutes, *and which is now not required to comply with said section* or which has thereafter, and before the passage of this section complied with said section, shall be and is hereby relieved from any disability provided in said statute or prohibition therein contained, so far as said section relates to the acquisition and holding of the property so acquired, or attempted to be acquired, and the title so acquired, or attempted to be acquired, is hereby confirmed.

Section 2. This act shall take effect upon passage and publication.

Approved May 11, 1917."

The manifest purpose in this legislation was to relieve foreign *"corporations not organized or conducted for profit"* from filing their articles of incor

poration in the state by exempting them from the requirements of Section 1770b in that respect, and also to bring said corporations within the remedial provisions of Section 1770j (Ch. 142, Laws 1911, as amended), by inserting in subdivision 1 thereof the words *"and which is now not required to comply with said section."* But this amendment did not help out the Realty Company, for confessedly it is not a *"corporation not organized or conducted for profit"* within Section 1770b as amended, and therefore not a corporation under Section 1770j "which is now not required to comply with said section" (1770b).

Nor is the Realty Company a corporation within the meaning of Section 1770j (1) *"which has thereafter* (referring to its attempted acquisition of title) *and before the passage of this section* (1770j) *complied with said section"* (1770b), for the reason that "this section" (1770j) was passed May 12, 1911.

> "Where an amendment is made by declaring that the original statute 'shall be amended so as to read as follows,' retaining part of the original statute and incorporating therein new provisions, the effect is not to repeal, and then re-enact, the part retained, but such part remains in force as from the time of the original enactment, while the new provisions become operative at the time the amendatory act goes into effect, and all such portions of the original statute as are omitted from the amendatory act are abrogated thereby and are thereafter no part of the statute."

Black on Interpretation of Laws (2nd Ed.) Sec. 168, p. 179, quoted approvingly in

Dallman vs. Dallman, 159 Wis. 480, 486, where it is said:

"It has long been the settled law of this state that a later statute which amends a former statute to read as in the later statute indicated continues in force all the provisions of the former statute found in the later statute. This as said, in *Julien vs. Model B. L. & L. Assn.*, 116 Wis. 79, 90, is common law although embodied, so far as relates to the revised statutes, in Sec. 4985, Stats. 1898."

Sec. 4985: "The provision of these revised statutes, so far as they are the same in substance as those of existing laws, shall be construed as a continuation of such laws and not as new enactments and references in laws not repealed to provisions of laws incorporated into these revised statutes and repealed shall be construed as applying to the same provisions so incorporated."

These rules are sustained by:

Glentz vs. State, 38 Wis. 549, 554;
State vs. Gumber, 37 Wis. 298, 303;
Hurley vs. Texas, 20 Wis. 634;
State ex rel. Ohlenforst vs. Beck, 139 Wis. 37, 40;
Scheftels vs. Tabert, 46 Wis. 439, 446;
Laude vs. C. & N. W. R. Co., 33 Wis. 640, 643;
Fullerton vs. Spring, 3 Wis. 667.

To illustrate the point a little further by reference to the language used, Chapter 142, Laws of 1911, in terms "created a new section" to be added to the statutes and to be known as "Section 1770j." Said "Section" consisted of two "subsections," and it will be found that throughout said Chapter 142 and all

amendments of said Section 1770j, the terms "subsection," "this section" and "this act" are used with discriminating care.

The words "this section" always refer to *Section 1770j, as a whole and as enacted in 1911,* while the subsections are referred to by number, and the words "this act" are used in the ordinary sense. Thus, while Chapter 142 of 1911 relieved from disability corporations which had complied with the law before the passage of "this act," when it was desired by Chapter 212, Laws of 1913, to *confirm the titles* of those corporations, which the court in the *Lanz-Owen* case (decided January 7, 1913) had declared to rest upon the *statute of limitation* contained in subsection 2, the words "this act" were changed to "this section," showing that it was not the purpose to *extend the period of grace* to the time of passage of the "act" of 1913, but the intent was to confine such *additional relief* to corporations complying prior to May 13, 1911, when this new "Section" 1770j was published.

The same purpose is evinced by the retention of the words "this section" in the 1917 amendment to subsection 1 of said Section 1770j. It should be noted that the Act of 1917, did not set out *subsection 2* of 1770j at all, but left it precisely as in the amendment of 1913, showing that the only object of the change in Subsection 1 of 1770j was to include under its provisions those corporations, "not organized for profit," which had by Section 1 of said Chapter 211, Laws of 1917, been *excepted* from the operation of Section 1770b; the conclusion from all which is that up to the present time *only foreign corporations which had*

complied with Section 1770b prior to the passage of Chapter 142, Laws of 1911, are relieved from disability as regards lands acquired or attempted to be acquired before compliance.

Counsel argue that because of the uniform substitution of the words "this section" for the words "this act" in the amendment of Section 1770j by Chapter 212, Laws of 1913 (in which assumed premise they are only in part correct, inasmuch as we have already pointed out, the words "this section" were contained in the final reading of the Act of 1911 wherever reference was made to the new section itself) the legislature manifested a purpose to *extend* the validation of titles to corporations which had complied with the terms of Section 1770b between 1911 and 1913. We confess ourselves unable to grasp the reasoning upon which this conclusion is predicated, even if counsel's premise was wholly correct.

So far as this point is concerned, what the legislature of 1913 did was to substitute, in sub-section 1, the phrase (referring to the class of corporations intended to be affected thereby,)—"which has thereafter and before the passage of *this section,* complied," etc., in place of "which has thereafter, and before the passage of *this act,* complied;"—and in sub-section 2, the phrase "within one year from the passage and publication of *this section,*" for "within one year from the passage and publication of *this act.*"

It seems to us that had the amendatory act of 1913 in terms relieved from disability all corporations which had attempted to acquire title to land in this state before compliance with Section 1770b, and

which had thereafter, and before the passage of *this act* complied with said section, then counsel might have had good ground for contending that all corporations complying *up to that time,* that is, up to the time of the passage of such amendatory "act," were intended to be included; but by making the compliance upon which removal of disability is conferred referable in point of time to a period prior to the passage of "this section," keeping in mind the distinction already noted between "this section" and "this act," and that the same words just below in the phrase "Sub-section 1 of this section," found in the Act of 1911, manifestly refers to the "new section 1770j" created by that act, it appears perfectly clear that the *validation* of titles as expressed in and completed by the Act of 1913 was confined and limited to corporations which had so complied prior to May 12, 1911.

This is confirmed by the history of the legislation, and of the circumstances and judicial action which gave rise thereto. It was not generally known or appreciated by foreign corporations entering Wisconsin for business purposes, nor even by the bar of the state, that the effect of Section 1770b was to render void conveyances of land within the state to such foreign corporations, until the announcement in *Hanna vs. Kelsey Realty Company*, 145 Wis. 276, which antedated the curative Act of 1911 by only about three months. For this reason, and because such corporations in many instances hastened to comply with Section 1770b, thinking that would relieve them from the consequences of previous violation, while many others previously complying, had failed to appreciate the

necessity of *priority* of compliance before taking conveyance of land, it was considered grace should be extended to this class of corporations whose unfortunate position was due to ignorance of the drastic nature of this statute, and its real effect upon titles. The Statute of 1911 was therefore enacted for the relief of this class of corporations whose good faith was, and that very properly, assumed. But the legislature at the same time carefully protected the rights of all parties which might be adversely affected, by giving to them one year's time, after the passage and publication of the act, in which to assert their rights by action or defense.

Save in exempting "corporations not organized or conducted for profit" from compliance with the provisions of Section 1770b, by Chapter 211, Laws of 1917, the legislature has never attempted or intended, to relieve from disability any other class of corporations than those that had complied after acquiring or attempting to acquire title to real estate and prior to May 12th, 1911.

Following the enactment of that statute, and in the early part of 1913, came the decision in the *Lanz-Owen* case (151 Wis. 555) which placed real estate titles attempted to be acquired by corporations coming within the terms of Sub-section 1 of Section 1770j upon the footing of titles by *limitation* only; and it is perfectly clear that when Chapter 212, Laws of 1913, was enacted it was precisely *because* the legislature intended merely to *validate and confirm* these titles, and not to extend the benefit to corporations complying between May 12, 1911, and May 10, 1913, that

the legislature changed the phrase "before the passage of this act," where it occurred in Sub-section 1, of Section 1770j as it then stood in the Statutes of 1911, and the corresponding words in Sub-section 2, by substituting the word "section" for the word "act," thereby at the same time making the use of the words "section" and "sub-section" uniform in the law as amended.

That substitution of the word "section" in the sixth line of Sub-section 1 of the 1913 enactment, is not indicative of the legislative intent argued for by counsel for plaintiffs in error, is evident from a mere reading of that sub-section which declares that any corporation therein referred to attempting to acquire title "before complying with the terms of Sec. 1770b of the statutes, and which has thereafter and before the passage of this section complied with said section, shall be and is hereby relieved," etc.

What do the words "this section" refer to? Clearly they refer to Sec. 1770j of the statutes of which they are a part, and not to Sec. 1 of Ch. 212, Laws of 1913, as counsel for appellants erroneously read them. And what period of time is referred to by the words "before the passage of this section?" Manifestly it was before the passage of Sec. 1770j. Now Sec. 1770j *was passed* in 1911 by the enactment of Ch. 142, approved May 12, 1911, the first section of which declares "there is added to the statutes a new section to read: Sec. 1770j," etc. That Sec. 1770j was passed in 1911 and not in 1913 is furthermore indicated by the title to Ch. 212, Laws of 1913, which declares it to be "an act to amend Sec. 1770j of the statutes." And Sec. 1 de-

clares that "Sec. 1770j of the statutes is amended to read:" etc.

We quite agree with the court below that this is immaterial to the determination of the question arising in this case, since confessedly the Realty Company did not comply with the terms of Section 1770b prior to May 10, 1913, and the words "this section" as they appear in Chapter 211, Laws of 1917, in the amendment to Section 1770j, are not new, but are a mere retention or re-enactment of the same words as found in the Act of 1913, and said Chapter 211, Laws of 1917, does not purport to be a revision, re-enactment or even an amendment of the whole Section 1770j, but merely amends sub-section 2 of Section 1770b and *sub-section 1* of said Section 1770j.

If we proceed now to examine Ch. 211, Laws 1917, it will be found that, as customary in the legislation of recent years, the changes intended to be made are indicated by the use of italics.

It is plain that the only purpose of this legislation was to exempt "corporations not organized or conducted for profit" from the necessity of complying with Sec. 1770b, and to include them among the corporations whose titles were confirmed.

Note further, that this act of 1917 consists of *two sections*, of which the *first* embraces in consecutive order amendments to both Sec. 1770b and Sec. 1770j of the statutes, and the *second* declares when the *act* shall go into effect.

The amendment to Sec. 1770b, besides including among the non-exempted corporations those "not organized or conducted for profit," also contain this

final clause: "*Nothing in this section contained shall affect the rights of parties in any action which may now be pending.*"

True, this was copied from Sec. 1770b as it previously stood in the statutes, but so were the same words "this section," in the amendment of Sub-section 1 of Sec. 1770j, copied from that section as it then stood in the statutes.

If, therefore, as contended by counsel for plaintiffs in error, the words "this section," although so copied, are to be construed as referring to Sec. 1 of this amendatory Act of 1917 in the one place, they must also be so construed in the other, and in that case nothing in said amendatory act would affect the rights of the parties to this action which was then pending (although tried and submitted nearly a year previous), and had been pending for over four years before this act was passed.

Respectfully submitted,

JOHN B. SIMMONS,
WILLIAM E. BLACK,
Counsel for Defendants in Error.

MUNDAY, TRUSTEE, ET AL. *v.* WISCONSIN TRUST COMPANY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 288. Argued March 25, 1920.—Decided April 19, 1920.

Whether a state statute is intended to validate a contract previously unenforceable under the state law is for the state courts finally to decide and involves no federal question. P. 502.

As applied to transactions subsequent to its enactment, a state law providing that conveyances of local realty taken by sister-state corporations before they have filed their articles with the local secretary of state shall be wholly void on behalf of them or their assigns, violates neither the contract clause nor the due process clause of the Fourteenth Amendment. P. 503.

The power of the State to exact such conditions of outside corporations precedent to acquisition of land within the State, and the rule that conveyances are governed by the *lex loci rei sitæ*, are not affected by delivery of the deeds, etc., in another State; the transaction does not thus become a matter of interstate commerce. *Id.*

168 Wisconsin, 31, affirmed.

THE case is stated in the opinion.

Mr. Walter Bachrach, *Mr. Hamilton Moses* and *Mr. Thomas M. Kearney*, for plaintiffs in error, submitted:

Under § 1770b, and more particularly sub-section 10 thereof, both as written, and as construed by the Supreme Court of Wisconsin prior to the making of the contract and the execution and delivery of the deeds in controversy, such deeds were merely voidable and not void. Such statute as now administered and enforced against plaintiffs in error by the Supreme Court of Wisconsin, so as to

render such deeds absolutely void, impairs the obligation of such contract and deeds and deprives plaintiffs in error of their property without due process of law. *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S. 478; *Mackay Telegraph Co.* v. *Little Rock*, 250 U. S. 94, 98; *Kaukauna Co.* v. *Green Bay, etc., Canal Co.*, 142 U. S. 269; *Muhlker* v. *New York & Harlem R. R. Co.*, 197 U. S. 544, 570; *Sauer* v. *New York*, 206 U. S. 536, 549; *Ohio Life Ins. Co.* v. *Debolt*, 16 How. 432; *Gelpcke* v. *Dubuque*, 1 Wall. 206; *Douglass* v. *Pike County*, 101 U. S. 687.

Section 1770b, and more particularly sub-section 10 as administered and enforced in the case at bar, so as to render void the contract and deeds made and delivered in Illinois, violates the due process clause of the Fourteenth Amendment.

The judgment of the Supreme Court of Wisconsin in declaring the deeds void and in refusing to give them efficacy, notwithstanding the validating statute of 1917, deprived plaintiffs in error of their property, without due process of law in violation of the Fourteenth Amendment. *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 233, 234; *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, 147; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Louisiana Ry. & Nav. Co.* v. *New Orleans*, 235 U. S. 164; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486; *Houston &c. R. R. Co.* v. *Texas*, 177 U. S. 77; *McCullough* v. *Virginia*, 172 U. S. 109.

The legislature of Wisconsin, by the passage of the amendatory Act of May 11, 1917, confirmed the title of the Realty Company, its grantee and successors in title, and absolutely and unconditionally validated the title theretofore attempted to be granted by the Trust Company and Robinson.

Mr. William E. Black, with whom *Mr. John B. Simmons* was on the brief, for defendants in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

The court below declared null and void two separate deeds whereby defendants in error undertook to convey to the Realty Realization Company, a Maine corporation, certain land in Wisconsin upon the ground that the grantee had failed to comply with the statute of the State prescribing conditions under which foreign corporations might acquire title to property therein. The deeds were dated and delivered in Illinois February 28, 1913. A subsequent deed from the Realty Company and a mortgage by its grantee were also declared ineffective, but they need not be separately considered here. 168 Wisconsin, 31.

At the time of the transactions in question the applicable statutory provisions concerning foreign corporations were sub-sections 2 and 10 of § 1770b, Wisconsin Statutes, 1911, which follow:

Sec. 1770b. "2. No corporation, incorporated or organized otherwise than under the laws of this state, except railroad corporations, corporations or associations created solely for religious or charitable purposes, insurance companies and fraternal or beneficiary corporations, societies, orders and associations furnishing life or casualty insurance or indemnity upon the mutual or assessment plan, shall transact business or acquire, hold, or dispose of property in this state until such corporation shall have caused to be filed in the office of the secretary of state a copy of its charter, articles of association or incorporation and all amendments thereto duly certified by the secretary of state of the state wherein the corporation was organized. . . ."

Sec. 1770b. "10. . . . Every contract made by or on behalf of any such foreign corporation, affecting the personal liability thereof or relating to property within this state, before it shall have complied with the provisions

of this section, shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them."

The original proceeding was instituted March 30, 1913. While it was pending in the Circuit Court the Realty Company complied with § 1770b and obtained a license to do business and hold property in Wisconsin—October, 1915. On May 11, 1917, the legislature enacted c. 211, Laws of 1917, which amended sub-section 1 of § 1770j of the statute to read:

"Any corporation organized otherwise than under the laws of this state, having acquired, or attempted to acquire, legal title by deed, or lease to any real property in this state, before complying with the terms of section 1770b of the statutes, and *which is now not required to comply with said section or* which has thereafter, and before the passage of this section, complied with said section, shall be and is hereby relieved from any disability provided in said statute or prohibition therein contained, so far as said section relates to the acquisition and holding of the property so acquired, or attempted to be acquired, and the title so acquired, or attempted to be acquired, is hereby confirmed."

Plaintiffs in error unsuccessfully challenged the validity of § 1770b upon the ground of conflict with the contract clause, § 10, Article I of the Federal Constitution and the due process clause of the Fourteenth Amendment. They further insisted that if § 1770j as amended by c. 211, Laws of 1917, was not so applied as to validate the deeds in question, rights, privileges and immunities guaranteed to them by the Fourteenth Amendment would be infringed.

Obviously, no impairment of any federal right resulted from the construction placed upon § 1770j as amended in 1917. Whether that section did or did not validate a contract theretofore unenforceable was a question for the

state court finally to decide—it involved no right under the Constitution or laws of the United States.

Section 1770b was enacted prior to the transactions here in question and the settled doctrine is that the contract clause applies only to legislation subsequent in time to the contract alleged to have been impaired. *Cross Lake Shooting & Fishing Club* v. *Louisiana*, 224 U. S. 632, 639.

In support of the claim that sub-section 10, § 1770b as construed by the court below conflicts with the due process clause it is said: "The contract between the defendants in error and the Realty Company, and the deeds delivered in compliance therewith were all made in Illinois They have been declared void in the State of Wisconsin. So applied the statute deprives plaintiffs in error of their property without due process of law."

Allgeyer v. *Louisiana*, 165 U. S. 578, 591, is relied upon as adequate authority to support the point presented; but we think it is wholly irrelevant.

Where interstate commerce is not directly affected, a State may forbid foreign corporations from doing business or acquiring property within her borders except upon such terms as those prescribed by the Wisconsin statute. *Fritts* v. *Palmer*, 132 U. S. 282, 288; *Chattanooga National Building & Loan Association* v. *Denson*, 189 U. S. 408; *Interstate Amusement Co.* v. *Albert*, 239 U. S. 560, 568.

No interstate commerce was directly involved in the transactions here questioned. Moreover, this court long ago declared—"The title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situated." *United States* v. *Crosby*, 7 Cranch, 115, 116.

The judgment of the court below is

Affirmed.